82-1153

NO.

Supreme Court, U.S.
FILED
JAN 10 1983
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MOTOR CLUB OF AMERICA INSURANCE COMPANY,
A Corporation of the State of New Jersey,

Appellant,

vs.

STATE OF NEW JERSEY, STATE OF NEW JERSEY DEPARTMENT OF INSURANCE and JAMES J. SHEERAN, NEW JERSEY COMMISSIONER OF INSURANCE,

Appellees.

On Appeal from the Supreme Court of New Jersey

JURISDICTIONAL STATEMENT

STANLEY WEISS, *Counsel for Appellant*
ROBERT E. TURTZ

CARPENTER, BENNETT & MORRISSEY,
Attorneys for Appellant, Motor Club of America Insurance Company,
744 Broad Street,
Newark, New Jersey 07102.
(201) 622-7711

Adams Press Corp., 50 Park Place, Newark, New Jersey 07102—(201) 623-8611

Questions Presented by the Appeal

1. Do the allegations of Appellant's Complaint* that its assets and equity have been drastically eroded and its earning power substantially destroyed by New Jersey's automobile insurance regulatory system which, since 1975, has caused Appellant to incur continuing operating losses and prohibited its withdrawal from such losing business, state claims that Appellees have effected a taking of Appellant's property for a public use without the payment of just compensation required by the Fourteenth Amendment to the United States Constitution?

2. If Appellant's Complaint does state valid claims, have the Courts below denied Appellant federal due process of law by depriving Appellant of the opportunity to prove those claims at a trial?

3. Was it error for the Courts below to preclude a member of a regulated industry from ever recovering for past takings of its property through excessive regulation by holding that just compensation may only be awarded for

---

* In addition to Appellant, the parties to the action in the State court were: James J. Sheeran, Commissioner of Insurance; New Jersey Department of Insurance; and the State of New Jersey. Subsequent to the institution of the action, Joseph F. Murphy was named Commissioner of Insurance in place of James J. Sheeran. Pursuant to R. 4:34-4 of the New Jersey Court Rules, (A. 135a) Mr. Murphy is deemed to have been substituted as a defendant in place of Mr. Sheeran.

Appellant's parent company, subsidiaries (except wholly-owned subsidiaries) and affiliates are as follows: Motor Club of America; Motor Club of America Enterprises, Inc. d/b/a Motor Club of America; Motor Club of America Finance Company; Teachers Underwriting Agency; Automobile Association of New Jersey; Modern Care Centers of America, Inc.

takings occurring subsequent to the entry of a declaratory judgment determining that the regulatory system was effecting such takings; and was it further error for the Courts below to hold that Appellant may never seek such declaratory judgment?

4. To the extent that the judgment below is based upon the availability, under N.J.S.A. 17:29A-24 (A. 81a), of judicial review of rate making decisions or implicit findings of laches, waiver, or consent by Appellant; (a) are any of such grounds legally sufficient to bar Appellant's claim for just compensation, and (b) does it not deprive Appellant of federal due process of law to deny it the opportunity to prove at trial its contention (acknowledged by the trial court) that the right to judicial review of automobile insurance rate making may be illusory and its further contentions that a fully developed factual record will not support findings of laches, waiver, or consent in this case?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED BY THE APPEAL	i
PARTIES TO THE PROCEEDING	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS AND COURT RULES	4
STATEMENT OF THE CASE	5
RAISING THE FEDERAL QUESTIONS	14
THE QUESTIONS ARE SUBSTANTIAL	16
CONCLUSION	29

APPENDIX:

Opinion and Judgment of the Superior Court of New Jersey, Appellate Division (June 28, 1982)	1a
Opinion of the Superior Court of New Jersey, Chancery Division (Honorable William A. Dreier, J.S.C.) (June 2, 1981)	5a
Order of the Superior Court of New Jersey, Chancery Division (Honorable William A. Dreier, J.S.C.) (July 6, 1981)	19a
Order of the Supreme Court of New Jersey Dismissing Appeal and Denying Petition for Certification (October 14, 1982)	21a

PAGE

Notice of Appeal to the Supreme Court of the United States (December 29, 1982) 23a

Verified Complaint (October 27, 1980) 26a

Exhibit A to Verified Complaint 43a

Exhibit B to Verified Complaint 47a

Affidavit of David Green (November 12, 1980) .. 48a

Order of the Appellate Division in Automobile Insurance Plans Service Office v. James J. Sheeran, No. A-1024-77 (April 25, 1978).. ..... 63a

Affidavit of Robert J. Schraeder (November 12, 1980) 65a

Appendix A to Schraeder Affidavit 68a

Appendix B to Schraeder Affidavit 73a

Appendix C to Schraeder Affidavit 74a

Statutory Material, Regulations, and Court Rules 75a

PAGE

Table of Authorities

Cases Cited

Aaron v. United States, 311 F.2d 798 (Ct. of Cl. 1963) 24

Armstrong v. United States, 364 U.S. 40 (1960) 18

Automobile Insurance Plans Service Office v. James J. Sheeran, No. A-1024-77 April 25, 1978 10

Board of Pub. U. Comm'rs v. N.Y. Telephone Co., 271 U.S. 23 (1926) 19

Brooks-Scanlon Co. v. R.R. Comm'n, 251 U.S. 396 (1920) 15, 19, 29

Bullock v. Railroad Comm'n, 254 U.S. 513 (1921) 19

Federal Power Comm. v. Hope Natural Gas Co., 329 U.S. 591 (1944) 19, 25, 29

Garrity v. New Jersey, 385 U.S. 493 (1967) 26

Hilkovsky v. United States, 504 F.2d 1112 (Ct. of Cl. 1974) 24

In re Intrastate Industrial Sand Rates, 66 N.J. 12, 327 A.2d 427 (1974) 8, 25

In re N.J. Power & Light Co., 15 N.J. 82, 104 A. 2d 1 (1954) 8, 24

In re Revision of Rates of Toms River Water Co., 82 N.J. 201, 412 A.2d 430 (1980) 8

In re Valuation Proceedings Under §§ 303(c) and 306 of the Regional Rail Reorganization Act, 439 F. Supp. 1351 (Sp.Ct. RRRA 1977) 28

Insurance Co. of North America v. Howell, 80 N.J. Super. 236, 193 A.2d 386 (App. Div. 1963) 8

PAGE

In the Matter of Jersey Central P & L Co., 166 N.J. Super. 540, 400 A.2d 128 (App.Div. 1979) 25

Johnson v. Zerbst, 304 U.S. 458 (1938) 26

Marbury v. Madison, 1 Cranch 137 (1803) 17

Matthews v. Huwe, 269 U.S. 262 (1925) 3

Monongahela Navigation Co. v. United States, 148 U.S. 312 (1892) 25, 29

New Haven Inclusion Cases, 399 U.S. 392 (1970) 19

North Countries Hydroelectric Co. v. U.S., 118 F. Supp. 375 (Ct. of Cl. 1954) 22

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) 18

Pennsylvania Coal Company v. Mahon, 260 U.S. 393 (1922) 18, 22

Railroad Comm'n v. Eastern Texas R.R., 264 U.S. 79 (1924) 19

Regional Rail Act Cases, 419 U.S. 102 (1974) ..15, 19, 20, 29

San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621 (1981) 19, 20, 29

Sheeran v. Nationwide Mutual Ins. Co., 80 N.J. 548, 404 A.2d 625 (1979) 7

Smyth v. Ames, 169 U.S. 466 (1898) decree modified 171 U.S. 361 (1898) 18, 19

Sullivan v. Texas, 207 U.S. 416 (1908) 3

Tumey v. Ohio, 273 U.S. 510 (1927) 23

Tyson and Brother v. Barton, 273 U.S. 418 (1922) 22

Union Pacific R. Co. v. Public S. Comm. of Mo., 248 U.S. 67 (1918) 26, 29

United States v. Dickinson, 331 U.S. 745 (1947) 22, 24, 29

PAGE

United States Constitution Cited

Fifth Amendment 4

Fourteenth Amendment ..... i, 3, 4, 15

New Jersey Constitution Cited

Article I, Paragraph 20 ..... 3, 4

Statutes Cited

28 U.S.C. §1257(2) 3

N.J.S.A. 2A:14-1 ..... 4, 21

N.J.S.A. 17:29A-1(f) 4, 9

N.J.S.A. 17:29A-2 ..... 4, 9

N.J.S.A. 17:29A-3 ..... 4, 9

N.J.S.A. 17:29A-6 4

N.J.S.A. 17:29A-7 ..... 4, 8

N.J.S.A. 17:29A-14 ..... 4, 8

N.J.S.A. 17:29A-24 ..... ii, 4

N.J.S.A. 17:29D-1 ..... 4, 7

N.J.S.A. 17:30-8 ..... 4, 12, 15

N.J.S.A. 17:30C-1 through 30C-31 ..... 4, 12, 15, 27

N.J.S.A. 17:30C-3 13

N.J.S.A. 17:30C-4 13

N.J.S.A. 17:30C-9a 13

PAGE

N.J.S.A. 17:30C-9b 13
N.J.S.A. 17:30C-15 ..... 2, 13
N.J.S.A. 17:30C-17 13
N.J.S.A. 17:32-13 ..... 4, 11
N.J.S.A. 39:6A-1 through 6A-20 6
N.J.S.A. 39:6A-3 ..... 4, 7
N.J.S.A. 39:6A-4 ..... 5, 7
N.J.S.A. 39:6A-4a 7
N.J.S.A. 39:6A-4b-4e 7
N.J.S.A. 39:6A-8 ..... 5, 7
N.J.S.A. 39:6A-10 ..... 5, 7
L. 1975, C. 113, § 31 ..... 4, 12

Regulations Cited

N.J.A.C., Title 11, Ch. 3 7
N.J.A.C. 11:3-1.13 ..... 5, 7
N.J.A.C. 11:3-1.16 ..... 5, 9, 26
N.J.A.C. 11:3-8.1 ..... 5, 7

New Jersey Court Rules Cited

R. 2:2-1(a)(1) 2, 5
R. 4:34-4 ..... i, 5

PAGE

Other Authorities Cited

Conning & Company, Regulatory Review Property & Casualty Industry, pp. 5-24, October, 1980 6

Soulor, "Subsidization of Insurance—1979," Alliance of American Insurers, p. 11, September, 1981 11

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MOTOR CLUB OF AMERICA INSURANCE COMPANY,
A Corporation of the State of New Jersey,

Appellant,

vs.

STATE OF NEW JERSEY, STATE OF NEW JERSEY DEPARTMENT OF INSURANCE and JAMES J. SHEERAN, NEW JERSEY COMMISSIONER OF INSURANCE,

Appellees.

On Appeal from the Supreme Court of New Jersey

JURISDICTIONAL STATEMENT

Opinions Below

The opinion of the Superior Court of New Jersey, Chancery Division, and that of the Superior Court of New Jersey, Appellate Division, which are not reported opinions, appear in the appendix hereto (A. 1a through A. 18a). The Supreme Court of New Jersey did not write an opinion in this case.

Jurisdiction

In October, 1980, Appellant Motor Club of America Insurance Company, a New Jersey insurance carrier, commenced this action in the Chancery Division of the Superior Court of New Jersey against Appellees, the State of New Jersey, the State Department of Insurance, and the Commissioner of Insurance. Appellant sought just compensation for the taking of its property by New Jersey's system regulating the automobile insurance industry in that state and certain other relief.* Appellant contends that the cumulative impact of the regulatory system on Appellant since 1975 has been to cross the constitutional perimeter of permissible regulation and to take Appellant's property without the payment by Appellee, State of New Jersey, of constitutionally mandated just compensation in violation of the State and Federal Constitutions.

In October, 1982, without a prior trial or other proceeding for the development of the facts, the New Jersey Supreme Court entered Orders which summarily dismissed Appellant's appeal and denied Appellant's petition for certification.** The effect of the Orders was to allow to stand the June 28, 1982 judgment of the Appellate Division of the New Jersey Superior Court, which required the dismissal of Appellant's Complaint in its entirety for failure

---

* Appellant also sought to enjoin Appellees from commencing (on the grounds of capital impairment) delinquency proceedings against it which under N.J.S.A. 17:30C-15 (A. 94a), would lead to the appointment of Appellee, Commissioner, as receiver.

** Appellant appealed as of right to the Supreme Court of New Jersey on the basis that the case involves substantial questions arising under both the Federal and State Constitutions (N.J. Court Rules 2:2-1(a)(1)) (A. 135a). Appellant also, as a matter of caution, sought review in the State Supreme Court by filing a Petition for Certification.

to state a claim upon which relief may be granted, and which denied Appellant leave to amend that Comp[illegible]int.

The New Jersey Supreme Court's order which dismissed Appellant's appeal to that Court was necessarily grounded upon that Court's determination that no substantial constitutional issue was presented by that appeal. Therefore, that Order is a final judgment affirming the Appellate Division's June 28, 1982 judgment, *Tumey* v. *Ohio*, 273 U.S. 510, 515 (1927); *Matthews* v. *Huwe*, 269 U.S. 262 (1925). It is therefore the Dismissal Order of the New Jersey Supreme Court, filed on October 14, 1982, which is now presented to this Court for Review.*

The Notice of Appeal to this Court (A. 23a) was filed in the New Jersey Supreme Court on December 29, 1982. Because Appellant's claim drew into question, under both the State and Federal Constitutions, the validity of several important New Jersey statutes and the regulatory scheme thereunder as applied to Appellant, and because the decision of the New Jersey Supreme Court necessarily upheld the validity, as applied, of those statutes and the regulatory system, Appellant seeks review in this Court by direct appeal pursuant to 28 U.S.C. § 1257(2).**

---

* Had Appellant sought review in the New Jersey Supreme Court only by means of its petition for certification, and not by direct appeal, the denial of the petition for certification would not have constituted a final judgment, subject to review by this Court. Instead, the earlier judgment of the Appellate Division would be reviewable here, *Sullivan* v. *Texas*, 207 U.S. 416 (1908).

** We respectfully contend that the interpretation by the Courts below of New Jersey's Constitutional provision prohibiting the taking of private property for public use without just compensation, N.J. Const. Art. I, ¶20, also places that provision in direct violation of the Fourteenth Amendment of the Federal Constitution.

Constitutional Provisions, Statutes, Regulations and Court Rules

Fifth Amendment, United States Constitution:

> . . . nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, United States Constitution:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law.

Article I, ¶20, New Jersey Constitution:

> Private property shall not be taken for public use without just compensation . . .

New Jersey Laws*:

N.J.S.A. 2A:14-1
N.J.S.A. 17:29A-1(f)
N.J.S.A. 17:29A-2
N.J.S.A. 17:29A-3
N.J.S.A. 17:29A-6
N.J.S.A. 17:29A-7
N.J.S.A. 17:29A-14
N.J.S.A. 17:29A-24
N.J.S.A. 17:29D-1
N.J.S.A. 17:30-8
Laws of 1975, Ch. 113, § 31
N.J.S.A. 17:30C-1 through 30C-31
N.J.S.A. 17:32-13
N.J.S.A. 39:6A-3

---

* The Statutory Material, Regulations, and New Jersey Court Rules are reproduced in the Appendix hereto at A. 75a through A. 136a.

N.J.S.A. 39:6A-4
N.J.S.A. 39:6A-8
N.J.S.A. 39:6A-10

Regulations:

N.J.A.C. 11:3-1.13
N.J.A.C. 11:3-1.16
N.J.A.C. 11:3-8.1

New Jersey Court Rules:

R. 2:2-1(a)
R. 4:34-4

Statement of the Case

Appellant, the major subsidiary of Motor Club of America ("MCA"), was incorporated in New Jersey in 1928, and has, throughout its history, been principally engaged in insuring New Jersey automobile risks.* Appellant has been managed for its entire business existence by members of the family which founded it and its corporate parent, and, through the early 1970s, it prospered as a relatively small, stable, and profitable company. Thus, at year-end 1973, its surplus as to policyholders was $21,026,296 on a statutory insurance accounting basis, and its stockholders' equity was $26,098,990 on the basis of generally accepted accounting principles (A. 51a, 52a, 53a).

However, beginning in the year 1975, and continuing, without interruption, beyond the filing of the Complaint

* By way of example, in 1979, more than 77% of Appellant's net premiums were on account of New Jersey automobile policies and 90% of its net premiums were on account of all New Jersey policies (A. 27a).

herein in October, 1980, Appellant has suffered massive losses from its automobile business. During the years 1975 through 1979 those losses aggregated $31,634,621 (A. 56a). Thus, despite capital contributions of $10,250,000 to Appellant between 1976 and 1979 by its corporate parent, MCA, and by other companies affiliated with MCA, Appellant's surplus to policyholders at December 31, 1979 had been eroded to $3,209,000 on a statutory basis and its stockholders' equity reduced to $10,038,000 on a GAAP basis (A. 53a). But for the $10,250,000 contributed to Appellant (A. 53a) (and absent any consideration of the value of the present claims of Appellant) Appellant would have been insolvent.

Appellant contended and was prepared to prove that the drastic, adverse turn in its circumstances between 1975 and October, 1980, was directly caused by sweeping changes, introduced in the 1970s, in the system governing the automobile insurance business in New Jersey—changes which have brought massive operating losses to all automobile insurers in New Jersey and have marked New Jersey's regulatory system as the most oppressive and unsuccessful in the nation.*

In large measure the fundamental changes to the regulatory system were accomplished with the 1972 enactments of New Jersey statutes requiring compulsory liability insurance and "no-fault" insurance after January 1, 1973, N.J.S.A. 39:6A-1 through 6A-20. Those laws set forth certain mandatory provisions which must be included in all automobile policies or made available at the insured's op-

---

*A 1980 industry poll taken by Conning & Company indicated that 100% of the responding companies listed New Jersey as the worst state in the Union in which to do automobile insurance business (Conning & Company, *Regulatory Review Property & Casualty Industry*, pp. 5-24, October, 1980).

tion, *e.g.*, no fault personal injury protection benefit features which include unlimited medical protection (N.J.S.A. 39:6A-4a) (A. 111a, 112a); mandatory and additional income continuation benefits, essential service benefits, survivor benefits, and funeral expense benefits (N.J.S.A. 39:6A-4b through 4e; N.J.S.A. 39:6A-10) (A. 112a-115a); and compulsory liability coverage in the amounts of $15,000/30,000/$5,000 (N.J.S.A. 39:6A-3) (A. 110a). Despite the no-fault features, the statute provides only a token exemption from tort liability for personal injuries in the form of a $200 medical bill threshold, N.J.S.A. 39:6A-8 (A. 113a).

The governing statutes further require that every owner or registered owner of a car registered or principally garaged in New Jersey have such automobile insurance. (N.J.S.A. 39:6A-3; 6A-4; 6A-10). They also direct that the New Jersey insurance industry, through the Automobile Insurance Plan,* provide that coverage, regardless of the suitability of a particular person as a risk from an underwriting perspective, N.J.S.A. 17:29D-1 (A. 82a). Furthermore, New Jersey automobile policies are cancellable only on limited grounds, and (with unimportant exception) are subject to indefinite renewal despite their demonstrable unprofitability, *Sheeran* v. *Nationwide Mutual Ins. Co.*, 80 N.J. 548, 404 A.2d 625 (1979); N.J.S.A. 39:6A-3 (A. 111a); N.J.A.C. 11:3-8.1** (A. 127a).

---

* The Automobile Insurance Plan is set forth in the New Jersey Administrative Code, Title 11, Chapter 3 ("N.J.A.C., Title 11, Ch. 3").

** In the case of assigned risk policies under the Automobile Insurance Plan, the insurer is obligated to keep the risk for three years, after which the risk returns to the pool for reassignment if other insurance is not available (which is virtually always the case), N.J.A.C. 11:3-1.13 (A. 115a). The dropping of particular assigned risks after three years (or the cancellation of policies for nonpayment of premium during the three year period) does not alleviate the burden upon the insurer because new assigned risks necessarily replace the old ones as a matter of course.

In addition to mandating the nature and content of the automobile insurance policy and its required purchase by all New Jersey automobile owners, the statute vests Appellee, Commissioner of Insurance, with control over the approval of rates and premiums to be charged for those policies, N.J.S.A. 17:29A-7, N.J.S.A. 17:29A-14 (A. 79a, 80a). This control, exercised by a required prior approval of changes in rates, is of particular significance in light of the massive and continuing increases in the actual cost of the product which the State requires to be sold. Because all vehicle owners must purchase the product, irrespective of their ability to pay premiums which would cover those costs and which would be compensatory to the insurers, Appellees have considerable motivation, and through the Commissioner's control of rate approvals, the opportunity to keep rates and premiums at a minimum. Moreover, the statutory scheme provides no built-in protection against "regulatory lag," *i.e.*, there are no provisions authorizing interim rates while rate applications are pursued, and there is no provision limiting the time within which rate decisions must be made.* Furthermore, in New Jersey rates may be set prospectively, only, *In re N.J. Power & Light Co.*, 15 N.J. 82, 104 A.2d 1 (1954); *In re Intrastate Industrial Sand Rates*, 66 N.J. 12, 23, 327 A.2d 427, 433 (1974). They cannot be put into effect retroactively, even to the date of the application, *In re Revision of Rates of Toms River Water Co.*, 82 N.J. 201, 412 A.2d 430 (1980); and this is so even if the regulatory lag is unreasonable, *id*, 213, 214.

---

* The provision in N.J.S.A. 17:29A-7 which requires the Commissioner to act within 90 days of the filing of a rating system, applies only to filings of original systems. It does not apply to filings seeking approvals of rate changes, *Insurance Co. of North America* v. *Howell*, 80 N.J. Super. 236, 193 A.2d 386 (App.Div. 1963).

With respect to both the voluntary market and the residual market, Appellant is a subscriber or member of statutorily recognized rating organizations, N.J.S.A. 17: 29A-1(f); 29A-2; 29A-3 (A. 75a, 76a, 77a), which file and prosecute rate change applications on behalf of their members and subscribers.* For reasons which we discuss, *infra*, pp. 26-27 Appellant lacks the power to effectively challenge the determinations which are periodically made as a result of the rating organizations' filings, and those determinations have, in the main, established the rates and premiums charged by Appellant.

In practice, this rate making system resulted in substantial abuses under the Appellee, Commissioner Sheeran, who routinely not only delayed and severely cut legitimate applications for rate changes but also coercively conditioned his grants of relief upon the withdrawal of pending applications and the substitution in their stead of new applications for the lesser amounts he was prepared to grant rather than the greater amounts to which the applicants were entitled.

---

* Appellant is a subscriber to Insurance Services Office ("ISO") which files for its subscribers and members rate applications applicable to the voluntary market. Appellant is a subscriber to Automobile Insurance Plan Services Office ("AIPSO") which makes similar filings for rate approvals applicable to the residual market. With respect to the voluntary market, insurers may file rate applications, individually. While some of the larger insurers do make such individual filings, smaller companies such as Appellant cannot, on an actuarial basis, produce information upon which they could base individual filings. Unlike the case of the voluntary market, all insurers must be subscribers to AIPSO for purposes of the residual market and be bound by the uniform rates set as the result of AIPSO filings. N.J.A.C. 11:3-1.16 (A. 116a).

We contend that what typically occurred was as follows: A rating organization applied for an increased rate, and the Commissioner, after substantial delay, advised that he would grant a considerably smaller increase but only if the application were withdrawn and a new one for the lesser amount filed. If the new application were not filed for the lesser amount, the Commissioner would then deny the application in its entirety. The industry almost always complied, taking what it could get "up front," rather than foregoing any increase at all during a period of protracted litigation which, if won, would lead to a better rate, but which would apply only prospectively from the date of favorable court action and would therefore be largely rendered inadequate by the inflation occurring during the pendency of the matter before the Department and the courts. Because the original application had been withdrawn and a new one filed for the relief actually granted, attempts to secure judicial review have been dismissed as moot.*

That the New Jersey automobile regulatory system has thus operated coercively and is clearly diseased cannot be denied. Symptoms of the disease and its effect upon the New Jersey automobile insurance industry fill the public record. For example, as the studies of A.M. Best Company, Inc. show,** in the year 1979 the fifteen

---

* *See, e.g.,* unpublished Order of the Appellate Division of the Superior Court of New Jersey in *Automobile Insurance Plans Service Office* v. *James J. Sheeran,* No. A-1024-77, April 25, 1978 (A. 63a).

** See November 7, 1980 Affidavit of Robert J. Schraeder, Vice President of A.M. Best Company, Inc. (particularly ¶6), filed in this case on November 12, 1980 in support of Appellant's application to the Superior Court of New Jersey, Chancery Division, for the entry of an interlocutory injunction (A. 65a, 66a).

largest New Jersey automobile insurers paid out $201 million more in automobile accident claims than they collected in premiums. As against that underwriting loss the industry realized investment income and gain allocable to New Jersey automobile insurance business of $63,200,000 for a net New Jersey automobile loss of $137,800,000. In prior years the comparable losses to the industry were $109,900,000 in 1978; $63,300,000 in 1977; $145,500,000 in 1976; and $168,600,000 in 1975. In aggregate the fifteen largest carriers lost 625,100,000 as the result of New Jersey automobile insurance business between 1975 and 1979. As a consequence, companies doing business in the State will not write new policies in the "voluntary" market, with the result that new business goes into the residual market which the companies must service at huge losses under the Automobile Insurance Plan. These market distortions have led to a situation in which in 1979, New Jersey, alone, accounted for fully *33%* of the nationwide automobile residual market losses! (Soulor, "Subsidization of Insurance—1979," Alliance of American Insurers, p. 11, Sept., 1981).

The larger companies have been able to offset their New Jersey auto losses by auto profits earned in other states and by profits from other lines of business in New Jersey and elsewhere. A significant number of foreign insurers, which are not limited by any prohibition against voluntarily ceasing business operations, have surrendered their certificates of authority under N.J.S.A. 17:32-13 (A. 109a) and have simply withdrawn from the state. Appellant, on the other hand, has had to bear the full brunt of the coercive system. Its concentration on the New Jersey auto insurance market has precluded the offset of profits from other states or lines; and the fact that it is a domestic carrier has

precluded its withdrawal from New Jersey.* This preclusion was brought about by statutory developments in 1975 when the New Jersey legislature totally abrogated the right of a New Jersey incorporated insurance company to voluntarily cease operations, dissolve, and liquidate. That right had been previously enjoyed, at least in theory,** and had been set forth in N.J.S.A. 17:30-8 (A. 82a). In 1975 that statute was repealed by L. 1975, c. 113, § 31, (A. 84a), effective June 3, 1975, and the legislature simultaneously enacted the Rehabilitation and Liquidation Act, N.J.S.A. 17:30C-1 through 30C-31 (A. 84a), also effective June 3, 1975, and which provides in pertinent part:

(a) "Delinquency proceedings pursuant to this Act shall constitute the sole and exclusive method of liqui-

---

* As stated in the August 4, 1980 edition of Best's Insurance Management Reports (Appendix B to the Affidavit of Robert J. Schraeder, Vice President of A.M. Best Co., Inc., A. 65a):

> Despite the pullout of a number of companies from New Jersey and the glaring need for an adequate rate and reform of the no-fault law, Commissioner Sheeran has evinced little concern for the plight of the automobile insurers in his jurisdiction. The rationale appears to be that the underwriting profits from other lines and other states can carry the New Jersey burden. . . .
>
> . . . In the case of the Motor Club [Appellant], with auto insurance as the primary business and with 40% of that business coming in as assigned risks, the consequences have been disastrous.
>
> * * *
>
> . . . Unlike Geico, Nationwide, SAFECO and others that have done so, MCA has no option to withdraw from the State (A. 73a).

** See footnote, p. 15 *infra*.

dating, rehabilitating, reorganizing or conserving an insurer, and no court shall entertain a petition for the commencement of such proceedings, or any other similar procedure, unless the same has been instituted by the Commissioner" (17:30C-3);

(b) "The Commissioner shall commence any such proceeding by an application . . ." (17:30C-4);

(c) "Whenever under the laws of this State a receiver is to be appointed in delinquency proceedings for a domesic insurer, the Court shall appoint the Commissioner as such receiver" (17:30C-15);

(d) "An order to rehabilitate a domestic insurer shall direct the Commissioner forthwith to take possession of the property of the insurer and to conduct the business thereof" (17:30C-17);

(e) "An order to liquidate the business of a domestic insurer shall direct the Commissioner forthwith to take possession of the property of the insurer, to liquidate the business, to deal with the insurer's business and property in his own name as Commissioner or in the name of the insured . . ." (17:30C-9a);

(f) "The Commissioner may apply under this act for an order dissolving the corporate existence of a domestic insurer." (17:30C-9b).

The effect of these 1975 enactments has been to abolish Appellant's right to voluntarily cease operations and to close all forums to any applications by Appellant for that purpose, even in the face of continuing unabated losses. As a result the statute has granted the Com-

missioner the sole power to decide whether and on what terms liquidation should occur. The trial court stated its agreement with this conclusion (A. 6a, 7a, 17a), although the Appellate Division stated that it was unnecessary for it to reach the question in view of its other determinations (A. 3a).

Raising the Federal Questions

Appellant commenced this action to prove, *inter alia*, that the cumulative impact of the regulatory system effected a taking of its property for which it is entitled to just compensation. The federal questions were raised at the outset by Appellant's Verified Complaint (A. 26a through 47a). Specifically, in Count I Appellant set forth in detail New Jersey's statutory and regulatory enactments of the 1970s, which dramatically changed the system regulating the automobile insurance industry and which caused the true costs of the compulsory "no-fault" and liability policy to skyrocket. Appellant further detailed the confiscatory regulatory policies and determinations of Appellees and asserted:

> 13. The continuing losses . . . [of Appellant] . . . have been caused by New Jersey's confiscatory statutory and regulatory framework and the confiscatory regulatory policies and decisions of defendant, Commissioner. By virtue of the foregoing [Appellant's] property has been taken by the State of New Jersey for a public use without just compensation in violation of the Fourteenth Amendment of the United States Constitution and . . . (A. 32a, 33a).

In Count II (A. 33a) Appellant asserted that because of its continuing loss operations, it had a federal constitutional right to cease its business operations and withdraw its assets from the losing venture, citing *Brooks-Scanlon Co.* v. *R.R. Comm'n*, 251 U.S. 396, 399 (1920). It further asserted that the 1975 enactment of the Insurance Company Rehabilitation and Liquidation Act, N.J.S.A. 17:30C-1 through 17:30C-30 and the simultaneous repeal of N.J.S.A. 17:30-8, deprived New Jersey incorporated insurers of their previously enjoyed right to voluntarily cease business, dissolve, and liquidate. Appellant accordingly contended that the statutory abrogation* of its *"Brooks-Scanlon"* withdrawal rights in the face of its continuing losses amounted to an "erosion taking" of its property in violation of the Fourteenth Amendment of the United States Constitution, and entitling it to compensation therefor under the principles enunciated by this Court in the *Regional Rail Act Cases*, 419 U.S. 102 (1974).

Appellees moved to dismiss the Verified Complaint for failure to state a claim upon which relief may be granted. After extensive briefing of the federal constitutional (and other) issues and oral argument, the trial judge entered an order (A. 19a): (a) dismissing all of Appellant's claims for compensation set forth in Counts I, II, and III; (b) refusing to dismiss Count I insofar as it seeks declaratory relief as to the unconstitutionality of the insurance regulatory system; (c) dismissing Counts II and III in their entirety based upon a finding that Appellant had never sought

---

* In Count III (A. 35a) Appellant made the same allegations as in Count II with the following difference. In Count III Appellant stated that even prior to the statutory abrogation of its withdrawal rights in 1975, those rights were largely illusory because of the restraints imposed thereon by the regulatory system governing Appellant's business operations, *e.g.*, restricted cancellation and nonrenewal rights.

to cease its business operations in the past;* and (d) granting Appellant leave to amend Counts II and III to affirmatively assert a desire by Appellant to cease business.**

Upon appeal, the Appellate Division of the Superior Court of New Jersey affirmed the trial Court's Order to the extent that the trial Court's order had dismissed portions of the Verified Complaint; it reversed the remainder of the trial Court's Order; and it directed the trial Court to dismiss the Verified Complaint in its entirety (A. 2a). Appellant thereafter sought review in the Supreme Court of New Jersey (a) by direct appeal premised on the presence of substantial questions arising under the Federal and State Constitutions, and (b) by means of a petition for certification. By final Orders of October 12, 1982, filed October 14, 1982, the New Jersey Supreme Court summarily dismissed the appeal and denied Appellant's petition for certification (A. 21a).

The Questions are Substantial

This case raises the question of whether a state can be held accountable to pay just compensation where the cumulative impact of its regulatory system has been to take the

---

* We respectfully submit that this determination is wholly without foundation in the record. Appellant never conceded that it hadn't tried to stop operating and offered to prove the contrary. Moreover, it contended that, as a matter of law, it had no obligation to either "desire" or attempt to do a futile act.

** The Court's opinion stated: "If Appellant amends its complaint to assert a desire to quit operating, then, and from that time forward only, a cause of action is stated . . . (A. 18a).

assets of a member of a regulated industry. Appellant contends that New Jersey, in furtherance of the public weal, undertook a new social experiment in the regulation of the automobile insurance business. It mandated the sale of an extremely expensive insurance product; it required that the product be sold to all vehicle owners; it required that the product be sold below cost; and it impeded the ability of all insurers to stop selling the product and seized control of the rights of domestic insurers to decide whether to withdraw from such business, as well as to control the terms and incidents of any such withdrawal.

The experiment failed; and in its course, it destroyed the assets, net worth, and earning power of Appellant which had been nurtured over a generation of conscientious effort. New Jersey has now told Appellant, for reasons that are less than clear in the opinions below, that it has no remedy and is not entitled to a trial of its claim that its assets have been taken for a public use without the payment of just compensation. Whatever might be said for the practicality of the result, it is unprincipled and it is inconsistent with the many opinions of this Court which have sought to define the constitutional balance between the power of the sovereign and the rights of the property owner.

What is demonstrably the most coercive, unfair, and clearly unworkable insurance regulatory system in the country has been placed beyond the law and the Constitution and has been insulated from any comprehensive challenge by aggrieved citizens claiming past or threatened future injury. Such a result ignores the observation in *Marbury* v. *Madison*, 1 Cranch 137, 163 (1803) that "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." It disregards the long

established proposition that harsh regulation may, if it becomes sufficiently onerous, cross the constitutional line between legitimate regulation and a taking of property. *See, e.g.*, the statement of Holmes, J. in *Pennsylvania Coal Company* v. *Mahon*, 260 U.S. 393, 415, 416 (1922) that: ". . . while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." It denies the right of Appellant to prove that "in all fairness and justice," Appellee, State of New Jersey, on behalf of the public, rather than Appellant, should bear the financial burdens of the diseased New Jersey automobile regulatory system, *see Armstrong* v. *United States*, 364 U.S. 40 (1960). The question of how far is "too far" is not an easy one. As stated by Justice Brennan, writing for the Court in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978) "this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, . . ." Justice Brennan noted that a determination of the issue involved "essentially *ad* hoc, factual inquiries," and he identified "economic impact," interference with "distinct investment-backed expectations" and "the character of the governmental action" as particularly significant factors to be considered in deciding whether a taking had occurred as the result of that government action.

Under the circumstances, what proper justification is there for denying Appellant the opportunity to prove its case? It cannot be that it has failed to state a claim that a taking has occurred. The Complaint alleges a denial of the opportunity to earn a fair return; and even a regulated industry must be allowed such opportunity, however a "fair return" is defined, *Smyth* v. *Ames*, 169

U.S. 466 (1898) *decree modified* 171 U.S. 361 (1898); *Board of Pub. U. Comm'rs* v. *N.Y. Telephone Co.*, 271 U.S. 23 (1926); *FPC* v. *Hope Natural Gas Co.*, 329 U.S. 591 (1944). The Complaint also alleges that Appellant's right to withdraw from loss operations was destroyed; and this Court has repeatedly recognized that such a right is entitled to constitutional protection, *Brooks-Scanlon Co.* v. *R.R. Comm'n supra; Bullock* v. *Railroad Comm'n*, 254 U.S. 513 (1921); *Railroad Comm'n* v. *Eastern Texas R.R.*, 264 U.S. 79, 84 (1924); *New Haven Inclusion Cases*, 399 U.S. 392 (1970); *Regional Rail Act Cases, supra.*

The Complaint therefore alleges cognizable claims of regulatory takings. The remedy it seeks of the payment of just compensation for such takings is strongly supported by further opinions of this Court. *San Diego Gas & Electric Co.* v. *San Diego*, 450 U.S. 621 (1981) involved the question of whether the Fourteenth Amendment permitted limiting the remedy for a regulatory taking to declaratory relief. The majority declined to reach the merits of the question, holding that the Court lacked jurisdiction because of the absence of a final judgment below. Four members dissented on the jurisdictional holding and concluded on the merits that just compensation was required—a view expressly endorsed as well by Justice Rehnquist, a member of the majority. In an earlier, and even closer case to the present one, *Regional Rail Act Cases, supra*, it was held that the availability of a just compensation award under the Tucker Act for any potential erosion taking that might occur in the future justified rejecting a challenge to the facial constitutionality of the Regional Rail Reorganization Act. This holding sought to accommodate the public's need for a different type of social experiment with the constitutional protection afforded to property rights that

might be taken in the course of it; and the holding provides compelling authority for Appellant's present claim. The *Regional Rail Act Cases, supra,* along with the indications in the *San Diego Gas & Electric Co.* case, *supra,* stand in sharp contrast with the views stated below that just compensation is not an appropriate remedy for erosion takings of the property of regulated industries that occur before entry of a declaratory judgment that the regulation effects such takings.*

There is an undefinable measure in which the opinions below seem based upon other considerations, reflecting the view that Appellant's own conduct precludes its recovery or even the opportunity to prove what that conduct was or its justification. The opinions assume that Appellant waited too long in filing this suit, that it may have consented to the takings (or waived its rights) by failing to raise its issues at administrative or judicial levels of rate making proceedings, or that it failed to express the desire, or take other steps, to withdraw from business.** None of the assumed facts is sup-

---

* There is nothing in the language of the Constitution or prior cases to justify the distinction drawn in the Trial Court's opinion between the protection afforded real property owners and that afforded to the property interests of members of regulated industries (A. 13a-15a). Moreover, the Trial Court's conclusion that the latter have greater control over the taking process is unsupported and contrary to the theory of Count I of the Complaint which the Trial Court generally accepted.

** Appellees' principal argument in the Courts below was that Appellant's action constituted a collateral attack upon prior rate making decisions. The Trial Court rejected that argument (A. 11a-13a), and nothing in the Opinion of the Appellate Division suggests that that Court disagreed with the Trial Court on the issue.

ported by record proof. Each of them is contravened by Appellant which contends that, given the opportunity, it can show at trial, or even by affidavit (i) that the timing of the filing of the suit was reasonable; (ii) that it never had any realistic opportunity to present the issues raised by the suit in another forum and has not waived the constitutional rights which it asserts here; and (iii) that, prior to the filing of the suit, it made various unsuccessful efforts to cease writing policies, to wind down its business and to dispose of its assets in a manner protective of the interests of its creditors, policyholders, and shareholders. The Courts below were obliged on a motion to dismiss to accept that Appellant might make such showings. Instead, they assumed the contrary and imposed what are, in effect, irrebutable presumptions against Appellant as to the facts in question. Moreover, their decisions passed over important legal issues which bear heavily on the significance of those facts and which require resolution in any proper consideration of the matters. The need for such consideration is demonstrated by the following:

(a) On timeliness.

First, Appellant's claim for compensation is a legal claim, not an equitable one; and its timeliness *vel non* is governed by the applicable statute of limitations,* not by the equitable concept of laches.

---

*Although Appellees never asserted the defense of the statute of limitations, and the issue of what is the proper statute was never before the State Courts, we submit that the proper limitations period is six years from the accrual of Appellant's claim, N.J.S.A. 2A:14-1 (A. 75a).

Second, and more important, the issue of when Appellant's claim arose, which is, of course, a question of fact, *North Countries Hydroelectric Co.* v. *U.S.*, 118 F. Supp. 375 (Ct. of Cl. 1954), is a subtle one, requiring a determination of when the cumulative impact of the regulatory system effected a taking of Appellant's property. As Justice Holmes pointed out in *Pennsylvania Coal Company* v. *Mahon, supra,* 413, 415, 416, and in his dissent in *Tyson and Brother* v. *Barton,* 273 U.S. 418, 445-446 (1922), Appellant was clearly required to absorb losses of some severity over a period of time before a taking of its property could be recognized to have occurred. Appellant is prepared to introduce evidence of the cumulative impact on it, over time, of the regulatory system, evidence which will permit a court to determine when the effect became severe enough to effect a taking of Appellant's property. Thus, to the extent that the Trial Court's dismissal of the compensation claims, affirmed by the Appellate Division and State Supreme Court, was based upon the erroneous premise that Appellant was under a duty, at its peril, to promptly determine when its cause of action arose and to immediately bring suit, that dismissal cannot be sustained. *See, United States* v. *Dickinson,* 331 U.S. 745 (1947) where this Court, speaking through Justice Frankfurter, stated:

> The Government could, of course, have taken appropriate proceedings to condemn as early as it chose both land and flowage easements. By such proceedings it could have fixed the time when the property was "taken." The Government chose not to do so. It left the taking to physical events, thereby putting on the owner the onus of determining the decisive moment in the process of acquisition by the United States when the fact of taking could no longer be in controversy.
>
> • • •

The Fifth Amendment expresses a principal of fairness and not a technical rule of procedure enshrining old or new niceties regarding "causes of action" —when they are born, whether they proliferate, and when they die. We are not now called upon to decide whether in a situation like this a landowner might be allowed to bring suit as soon as inundation threatens. Assuming that such an action would be sustained, it is not a good enough reason why he must sue then or have, from that moment, the statute of limitations run against him. If suit must be brought, lest he jeopardize his rights, as soon as his land is invaded, other contingencies would be running against him—for instance, the uncertainty of the damage and the risk of res judicata against recovering later for damage as yet uncertain. The source of the entire claim—the overflow due to rises in the level of the river—is not a single event; it is continuous. And as there is nothing in reason, so there is nothing in legal doctrine, to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized. An owner of land flooded by the Government would not unnaturally postpone bringing a suit against the Government for the flooding until the consequences of inundation have so manifested themselves that a final account may be struck.

When dealing with a problem which arises under such diverse circumstances procedural rigidities should be avoided. All that we are here holding is that when the Government chooses not to condemn land but to bring about a taking by a continuing process of physical events, the owner is not required to resort either to piecemeal or to premature litigation to ascertain the just compensa-

tion for what is really "taken." 331 U.S. 745, 747, 748, 749.

See also Hilkovsky v. *United States,* 504 F.2d 1112, 1114 (Ct. of Cl. 1974); *Aaron* v. *United States,* 311 F.2d 798, 800, 801 (Ct. of Cl. 1963).

(b) On the opportunity to present the issues in other forums and waiver of rights.

The Appellate Division, while denying Appellant's rights to just compensation for the reasons indicated by the trial court, went on to also deny Appellant's rights to declaratory relief as to the unconstitutionality of the system, based upon its conclusion that: "The asserted delays in the administrative process or other allegedly improper regulatory practices can only appropriately be presented and considered in the context of a rate proceeding."* (A. 3a, 4a). Such conclusion is clearly erroneous for the reason that the issues raised by Appellant in this action for past takings are not cognizable in a rate-making proceeding and are wholly different from those which may be raised in such proceeding.

In New Jersey the issue involved in rate-making is the fairness of a rate which is designed to operate in the future, *In re N.J. Power & Light Co.,* 15 N.J. 82, 104 A.2d 1 (1954)—not whether past rates afforded a compensable return to the company. And rates, so established

---

* To the extent that this statement can be read to apply to past rate making proceedings, the principles of *United States* v. *Dickinson, supra,* discussed under the prior heading dealing with timeliness, as well as the principles now discussed, show why the statement is incorrect and why Appellant should not be foreclosed from maintaining this action for failure to seek review of such prior rate making decisions.

for prospective applications, may not contain a surcharge to compensate the company for past losses, *In re Intrastate Industrial Sand Rates,* 66 N.J. 12, 23, 327 A.2d 427, 433 (1974). Rate-making therefore raises questions primarily addressed to "due process" considerations, *i.e.*— the adequacy of the proofs as to the likely future impact of proposed rates—rather than to considerations involved under the "taking" clause, *see Federal Power Comm.* v. *Hope Natural Gas Co.,* 329 U.S. 591 (1944). Indeed, the Commissioner, an officer of the Executive Branch, lacks jurisdiction over the subject matter of claims for compensation for past takings of private property, *Monongahela Navigation Co.* v. *United States,* 148 U.S. 312, 327 (1892); *In the Matter of Jersey Central P & L Co.,* 166 N.J. Super. 540, 544, 400 A.2d 128, 130 (App. Div. 1979). Since those claims could not have been raised before the Commissioner in a rate-making proceeding, they would not have been before a Court reviewing the results of such proceeding. Appellant is entitled to a forum in which to try its claims that the cumulative impact of the system has effected a taking of its property; and it is clear that the Commissioner's rate-making proceedings are not such a forum.

Moreover, as set forth, *supra,* pp. 5-10 the inherent nature of the regulatory system and its coercive administration by Appellee, Commissioner, discouraged virtually all judicial review of rate making.* Consequently, as we now show, failure to challenge rate making determinations cannot be deemed to be a waiver of the constitutional

---

* The factual issues, which issues are involved in this case, of whether the Commissioner did administer the system coercively and whether the effect of such administration was to discourage virtually all judicial review of rate-making, could hardly have been raised in any evidentiary hearing before the Commissioner.

rights asserted here by Appellant, *Union Pacific R. Co.* v. *Public S. Comm. of Mo.*, 248 U.S. 67 (1918); *Garrity* v. *New Jersey*, 385 U.S. 493 (1967); *Johnson* v. *Zerbst*, 304 U.S. 458 (1938).

The governing bodies of the rating organizations, ISO and AIPSO, faced with the choice of accepting inadequate rate increases which would be approved by the Commissioner or seeking judicial review of the Commissioner's denial of any rate increases, have chosen the former alternative because of their fears that any victory in a protracted judicial challenge would be a pyrrhic one,—of little or no economic benefit whatever. Those fears were realistic because during the pendency of the review proceedings, no interim increases would be in effect and because any rates ultimately established as the result of the review proceedings would only operate prospectively from the date they were established.*

Also, Appellant could not have conducted its own filings because it is not large enough to generate the actuarial information needed to support them and because, with respect to assigned risks, such rates must be uniform and cannot be different from the AIPSO rates, *see* N.J.A.C. 11:3-1.16 (A. 116a). Furthermore, it is not reasonable to believe that Appellant could sell policies competitively if, by some means, it could secure rates significantly higher than the prevailing industry rates

---

* There is also a serious question of whether Appellant, acting alone, would have had standing to seek judicial review of rate determinations in proceedings initiated by ISO and AIPSO, where those determinations were accepted by those organizations, albeit (as Appellant alleges) under duress.

in the voluntary market.* We therefore respectfully submit that Appellant, by failing to challenge individual rate determinations in which the industry acquiesced, has not waived its constitutional right to just compensation as asserted in this case.

(c) Attempts to withdraw from business.

The Courts below concluded that at no time prior to the institution of this action did Appellant seek to withdraw from business (A. 4a, 17a) and utilized that conclusion as the basis for the dismissal of Counts II and III of the Complaint, the Counts premised upon Appellees' abrogation of Appellant's constitutionality protected withdrawal rights. The conclusion was improper for two reasons: (a) it was wrong to prejudge the factual question of whether Appellant desired or attempted to cease operating without affording Appellant an opportunity to submit proofs on the issue and (b) the assumed facts have no legal relevance to Appellant's claim because N.J.S.A. 17:30C-1 through C-31 destroyed Appellant's withdrawal rights and closed all forums to Appellant for the purpose of voluntary withdrawal.

With respect to the factual conclusion reached by the State Courts, we simply do not understand its basis. We specifically argued to the Trial Court, the Appellate Division, and the New Jersey Supreme Court, that it was premature to reach a judgment on the issue at this time; that the ultimate determination of the issue depended upon the interpretation to be placed upon the

---

* In an attempt to remedy the harsh impact of the system on Appellant, Appellant was permitted for a time to charge a rate 7% higher than the prevailing rates with respect to its voluntary market business.

relevant events and a stream of written and oral communications between Appellant and Appellees, the substance of which are not in the record, but which were subject to proof at trial; and finally, that upon Appellees' motion to dismiss for failure to state a claim, Appellant's factual assertion that it has been compelled by Appellees to continue its business despite its losses should be accepted as true.

As for the issue of relevance, the State Courts' requirement that Appellant must allege or demonstrate a "desire," or attempt, to cease operating as an element of these claims is contrary to the decision and reasoning of the Special Court in *In re Valuation Proceedings Under §§ 303(c) and 306 of the Regional Rail Reorganization Act,* 439 F.Supp. 1351 (Sp.Ct. RRRA 1977) where Judge Friendly stated:

> . . . the law does not compel the doing of a futile act and we are convinced that after Congress, on February 9, 1973, called on the Secretary of Transportation promptly to submit a report which "provides a full and comprehensive plan for the preservation of essential rail transporation services in the Northeast section of the nation," it was unrealistic to expect that a reorganization court would have authorized an application for large-scale abandonment. 439 F. Supp. 1351, 1373.

Here, as in that case, once the 1975 statutory enactments deprived Appellant of its voluntary withdrawal rights and closed all forums to Appellant for pursuing any application for that purpose, any "desire" or attempt to withdraw became futile, and therefore, unnecessary.

CONCLUSION

We respectfully submit that the determinations of the State Courts that Appellant may not recover compensation for the taking of its property is inconsistent with the holding of this Court in the *Regional Rail Act Cases, supra,* and with the expressed views of a majority of this Court in *San Diego Gas & Electric Co.* v. *San Diego, supra.* To the extent that the determinations below were based upon notions of untimeliness or laches in the commencement of the action, they contravene the teachings in *U.S.* v. *Dickinson,* 331 U.S. 745 (1947); to the extent that they were premised upon the assumed availability of alternative forums or upon waiver, they are in conflict with the principles set forth in *Federal Power Comm.* v. *Hope Natural Gas Co., supra; Monongahela Navigation Co.* v. *U.S., supra;* and *Union Pacific R.R. Co.* v. *Public Service Commission of Mo., supra.* In addition, the holdings that Counts II and III of the Complaint did not state claims upon which relief may be granted is inconsistent with *Brooks-Scanlon Co.* v. *R.R. Comm'n, supra,* and its progeny as well as with the holdings in *Regional Rail Act Cases, supra,* and the views expressed in *San Diego Gas & Electric Co.* v. *San Diego, supra.*

Accordingly, we urge the Court to grant plenary consideration of the issues raised by this appeal.

Respectfully submitted,

STANLEY WEISS, *Counsel for Appellant*
ROBERT E. TURTZ

CARPENTER, BENNETT & MORRISSEY,
Attorneys for Appellant, Motor Club of America Insurance Company.

[APPENDIX FOLLOWS]

APPENDIX

Opinion and Judgment of the Superior Court of New Jersey, Appellate Division (June 28, 1982)

(Filed—June 28, 1982)

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION—A-5084-80T3

MOTOR CLUB OF AMERICA INSURANCE COMPANY, a corporation of the State of New Jersey,

Plaintiff-Appellant,

vs.

STATE OF NEW JERSEY, STATE OF NEW JERSEY DEPARTMENT OF INSURANCE and JAMES J. SHEERAN, NEW JERSEY COMMISSIONER OF INSURANCE,

Defendants-Respondents.

Opinion and Judgment of the Superior Court New Jersey, Appellate Division (June 28, 1982)

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION—A-5423-80T3

MOTOR CLUB OF AMERICA INSURANCE COMPANY, a corporation of the State of New Jersey,

Plaintiff-Respondent,

vs.

STATE OF NEW JERSEY, STATE OF NEW JERSEY DEPARTMENT OF INSURANCE and JAMES J. SHEERAN, NEW JERSEY COMMISSIONER OF INSURANCE,

Defendants-Appellants.

Argued June 14, 1982—Decided June 28, 1982.

Before Judges Milmed, Joelson and Gaulkin.

On appeal from the Superior Court, Chancery Division, Mercer County.

Stanley Weiss argued the cause for plaintiff-appellant and respondent Motor Club of America Insurance Company (Carpenter, Bennett & Morrissey, attorneys; Stephen A. Gilbert, of counsel; Mr. Weiss and Robert E. Turtz, on the brief).

Opinion and Judgment of the Superior Court New Jersey, Appellate Division (June 28, 1982)

John J. Hayden, Deputy Attorney General, argued the cause for defendants-respondents and appellants State of New Jersey, State of New Jersey Department of Insurance and James J. Sheeran, New Jersey Commissioner of Insurance (Irwin I. Kimmelman, Attorney General, attorney; James J. Ciancia, Assistant Attorney General, and Mr. Hayden on the brief).

Per Curiam

We affirm paragraphs 1, 3 and 5 of the order of July 6, 1981 substantially for the reasons expressed by Judge Dreier in his opinion dated June 2, 1981. Our affirmance, however, should not be construed as our endorsement of Judge Dreier's apparent acceptance of plaintiff's contention that "[t]he only way for a domestic carrier to get out from under the burden of the New Jersey regulatory scheme is for the Commissioner to move against the carrier to liquidate it on one of several statutory grounds"; that matter need not be passed upon by us at this time.

Paragraph 2 of the July 6, 1981 order denied defendants' motion "to dismiss Count I of the Complaint so far as said Count I seeks declaratory relief." That denial proceeded from Judge Dreier's determination that plaintiff had sufficiently stated a cause of action that "the regulations as administered thwarted plaintiff's exercise of appellate rights" and that the present litigation "is plaintiff's only means of attack." We find Judge Dreier was mistaken in this regard. The asserted delays in the administrative process or other allegedly improper regulatory practices can only appropriately be presented and considered in the context of a rate

proceeding. *Cf. Switz* v. *Middletown Tp.*, 23 N.J. 580, 587 (1957). To explore the entire history of alleged practices of the State in insurance regulation, as projected by plaintiff in its declaratory judgment claim, would be, in our view, of no utility in determining whether or to what extent plaintiff might presently be entitled to any relief.

We also find paragraph 4 of the July 6, 1981 order to be improvident: at no time prior to institution of this suit did plaintiff seek to cease doing business in New Jersey.

Accordingly, paragraphs 2 and 4 of the July 6, 1981 order are reversed and the remaining provisions of the order are affirmed; the matter is remanded to the Chancery Division to enter an appropriate amended order which dismisses Count I of the Complaint in its entirety and which denies plaintiff leave to amend Counts II and III.

Opinion of the Superior Court of New Jersey, Chancery Division (Honorable William A. Dreier, J.S.C.) (June 2, 1981)

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION—MERCER COUNTY
Docket No. C 702-80E
Civil Action

MOTOR CLUB OF AMERICA INSURANCE COMPANY, a corporation of the State of New Jersey,

Plaintiff,

vs.

STATE OF NEW JERSEY, STATE OF NEW JERSEY DEPARTMENT OF INSURANCE and JAMES J. SHEERAN, NEW JERSEY COMMISSIONER OF INSURANCE,

Defendants.

Stanley Weiss argued the cause for plaintiff
(Carpenter, Bennett and Morrissey, Attorneys)

Mark S. Rattner, Deputy Attorney General argued the cause for defendants
(James R. Zazzali, Attorney General of New Jersey)

Date Decided: June 2, 1981

Opinion of the Superior Court of New Jersey, Chancery Division (Honorable William A. Dreier, J.S.C.) (June 2, 1981)

Dreier, J.S.C.

Motor Club of America Insurance Company (hereinafter MCAIC), a New Jersey corporation engaged in the business of writing automobile insurance, complains of the New Jersey regulatory system which governs that business, claiming that it has caused a flourishing, profitable enterprise to decline rapidly to the point where there is now question of its ability to remain solvent.

MCAIC asserts that the regulatory system, evolved by statute and administrative decrees[1] since the mid-1970's has had a general negative effect on the entire automobile insurance business in New Jersey, but has had a devastating effect on MCAIC because of certain peculiarities of MCAIC's position. The first of these is that MCAIC is almost totally invested in writing automobile insurance, and cannot, therefore, survive as other companies allegedly do by making profits in other lines of insurance to offset the losses sustained in automobile insurance. The second peculiarity of MCAIC's position is that it is a domestic carrier. It cannot, therefore, charge higher rates out of New Jersey to balance the loss operation within this state. Also, while foreign corporations may choose to relinquish their New Jersey licenses rather than work under the system as it exists,

---

[1] New Jersey controls the nature and substance of the insurance product to be sold (*e.g.* N.J.S.A. 39:6A-4; 39:6A-10), the persons to whom the product must be sold (*e.g.* N.J.S.A. 39:6A-3; 17:29D-1; N.J.A.C. 11:3-1, *et seq.*; N.J.S.A. 17:30B-1, *et seq.*), the price at which the products must be sold (N.J.S.A. 17:29A-7) and whether, when and on what terms the insurer can withdraw from business (N.J.S.A. 17:30C-1 *et seq.*) or dispose of its assets (N.J.S.A. 17:27A-1 *et seq.*; B-1 *et seq.*).

domestic corporations cannot voluntarily abandon New Jersey under N.J.S.A. 17:30C-1 *et seq.* The only way for a domestic carrier to get out from under the burden of the New Jersey regulatory scheme is for the Commissioner to move against the carrier to liquidate it on one of several statutory grounds, including insolvency. N.J.S.A. 17:30C-8[2]. Because it is thus both peculiarly damaged by the regulations at issue and unable to escape them, MCAIC contends the application of the legislative scheme to its business is unconstitutional. MCAIC seeks a declaration to this effect, as well as compensation for the general losses it has suffered over the past eight years, arguing that the regulation has effected an inverse condemnation, and a taking by erosion. Plaintiff alleges this confiscatory effect was accomplished, (1) by the constitutionally inadequate return allowed, (2) by the inadequate statutory provisions for administrative relief from rate making decisions and (3) by the unconstitutional prohibition against voluntary cessation of business.[3]

---

[2] The State has argued that voluntary dissolution is possible. The Court, however, agrees with MCAIC that reference in N.J.S.A. 17:30C-8(b) to voluntary dissolution is either an oversight or a reference to any such dissolutions which were pending at the time the law became effective in 1975. To find otherwise would be contrary to the manifest purpose of the new regulations which was to tighten, rather than relax, the Commissioner's control over the industry.

[3] There are four counts to MCAIC's complaint. The first demands compensation for the disastrous fall in MCAIC's sur-

(Footnote continued on following page)

Opinion of the Superior Court of New Jersey, Chancery Division (Honorable William A. Dreier, J.S.C.) (June 2, 1981)

The case is before this court today on motion by the Department of Insurance to dismiss for failure to state a cause of action. MCAIC is really engaged, the State argues, in a impermissible collateral attack on a series of rate making decisions, from each of which MCAIC had the right of appeal, which it chose not to exercise. Had MCAIC appealed, the rate might have been adjusted, and the losses of which it complains halted and reversed.

MCAIC counters that its damages were cumulative, and that, since any appeal from a particular decision

---

(Footnote continued from preceding page)

plus from $21,026,296. in 1973 to under $3,000,000. (on a statutory basis) at the present time, arising out of excessive regulation amounting to a taking of private property for public use. The second count demands compensation for the same losses on the ground they were sustained while operating under a scheme that would not allow a discontinuance of business. The third count demands compensation on the ground that even before voluntary cessation was totally eliminated it was excessively circumscribed, in effect forcing MCAIC to remain in a losing business. The fourth count demanded an injunction against a delinquency proceeding it was anticipated the Commissioner of Insurance was shortly to begin. This last count has been rendered moot. After the complaint was filed substantial new equity was infused into plaintiff company and the Commissioner agreed not to proceed at this time.

would have looked for prospective relief only[4], appellate relief would have left unaddressed its constitutional claim based on losses caused by past decisions. Plaintiff argues also that the appellate route available is constitutionally inadequate for two reasons. Delays in appellate process are excessive; the statutes provide no time limit within which the Commissioner must make a decision[5], and, in practice it is alleged, the Commissioner has used this factor coercively to discourage appeal. Additionally, there is no statutory provision for an interim filing for a rate adjustment pending appeal.[6] The result is that an appellant would suffer so long under the old rate that by the time any new one is granted it would be necessarily too little and too late, so much so that the company is better off accepting its inadequate increase early, rather than delaying it by prosecution of an appeal. Plaintiff asserts this situation is so coercive that, although ap-

---

[4] Both plaintiff and defendant agree any hypothetically adequate rate which might have been granted would have compensated plaintiff only from the date it was granted forward. It is well established that the rate set for a regulated industry cannot be geared to make up for past losses. *In re N.J. Power & Light Co.*, 15 N.J. 82 (1954); *In re Intrastate Industrial Sand Rates*, 66 N.J. 12 (1974); *In re Revision of Rates of Toms River Water Co.*, 82 N.J. 201 (1980).

[5] By contrast see N.J.S.A. 48:2-21(b)(1), declaring that the Board of Public Utility Commissioners must complete and close rate hearings within six (6) months and enter a final order in eight (8).

[6] Such provision is common in rate statutes. See, for example, N.J.S.A. 48:2-21.1.

proximately 125 million dollars has been lost annually in the industry since 1975, there has been *no* appeal in an effort to halt this drain.[7]

Three questions must be answered by this court in deciding the State's motion to dismiss. First, may plaintiff come to this Chancery Court seeking a declaration on any of the bases alleged that the New Jersey regulatory scheme is unconstitutional as applied, or in so doing is it making an impermissible collateral attack on rate making decisions? Second, assuming plaintiff could demonstrate it was not failure of business judgment but the inexorable effect of legislation which dramatically eroded its assets over the last several years, would plaintiff be entitled to compensation from the State? Third, assuming plaintiff could demonstrate it is a losing business which would not have been allowed to cease operations voluntarily, would plaintiff be entitled to compensation from the State where plaintiff had not wanted to cease operations and, in fact, initiated this law suit to enjoin the anticipated commencement of delinquency proceedings. (See footnote 3).

---

[7] In accordance with N.J.S.A. 17:29A-3 the insurance industry has applied for rates through an organization called Insurance Services Offices (ISO). MCAIC is a member company. Since 1973, ISO has, on behalf of member companies, requested eleven increases in the permissible rates on private passenger automobile coverage. It has received ten such increases and the last filed is still pending. All ten of the increases granted were less than the amounts sought, but ISO has never appealed, nor has MCAIC as an individual entity.

Opinion of the Superior Court of New Jersey, Chancery Division (Honorable William A. Dreier, J.S.C.) (June 2, 1981)

I

Of MCAIC's claims, only that which alleges an inadequate return could have been raised in an appeal from rate making. The attack on the adequacy of the appellate process and the attack on the statutory provisions forbidding voluntary withdrawal clearly would have had no forum there. MCAIC contends that even the gross inadequacy of the rate could not have been raised because it is a claim in inverse condemnation, that is, a remedy by which a property owner obtains compensation for a *de facto* taking of his property by a governmental authority. It was no particular rate which effected the taking, rather it was the cumulative effect of many rate decisions, each of which may have seemed arguably correct as a predictive matter, and thus sustainable as an exercise of defendant's administrative discretion. This is not persuasive. After the rate was set two or three times and losses followed in its wake, it must have been clear that something was wrong with the method of prediction. If MCAIC could not detect the Commissioner was in error, and in effect had no idea how to correct whatever was wrong, MCAIC has nothing to complain of. Its losses can be characterized as a failure of business judgment. If MCAIC did have an idea what was wrong but could not get the Commissioner to correct his method of decision, MCAIC would, under ordinary circumstances, be obliged to appeal. Not having appealed, its accumulated losses would be its own responsibility.

Of course if the regulations as administered thwarted plaintiff's exercise of appellate rights, this court may review plaintiff's claims notwithstanding plaintiff's failure to appeal.

Opinion of the Superior Court of New Jersey, Chancery Division (Honorable William A. Dreier, J.S.C.) (June 2, 1981)

Plaintiff's claims do state a cause of action. (a) Regulation may be found to have an unconstitutional effect where the rate allowed does not provide an adequate return to the business. *Smyth* v. *Ames*, 169 U.S. 466, 42 L.Ed. 819 (1898), decree modified 171 U.S. 361, 43 L.Ed. 197 (1898), *Helmsley* v. *Borough of Fort Lee*, 78 N.J. 200 (1978) App. dism. 440 U.S. 978, 60 L.Ed. 2d 237 (1979). Rates must, moreover, provide a constitutional return in the year in which they are in effect. *Bd. of Public Utilities Comm'rs* v. *N.Y. Telephone Co.*, 271 U.S. 23, 70 L.Ed. 808, 812 (1926); *State* v. *N.J. Telephone Co.*, 30 N.J. 16, 28-31 (1959); *Helmsley, supra* at 230. Therefore a regulatory scheme which provides an excessively slow mechanism for the *adjustment* of rates, one which cannot keep up with the realistic needs of the regulated business, may fail to meet constitutional standards on that basis. *Smith* v. *Illinois Bell Telephone Co.*, 270 U.S. 587, 70 L.Ed. 747 (1926), *Helmsley, supra.* Since MCAIC did not follow the available appellate route, it will be unable to establish as an historical matter the inadequacy of that route to provide it with a fair rate. It will have to demonstrate the scheme as provided is inevitably inadequate. In *Helmsley* owners of apartment buildings challenged the validity of a rent control ordinance as denying them a just and reasonable return. The Supreme Court of New Jersey found that the combined impact of the limitation on automatic rent increases with the difficulties of obtaining administrative relief created a confiscatory system. Before deciding that the route to administrative relief was inadequate, the Court reviewed every aspect of it and declared "[w]e are satisfied that the entire hardship structure as administered by the Fort Lee Rent Leveling Board, *could not* afford landlords prompt and efficacious relief . . ." (Emphasis added).

Opinion of the Superior Court of New Jersey, Chancery Division (Honorable William A. Dreier, J.S.C.) (June 2, 1981)

Since MCAIC asserts that the legislative scheme as written and as applied coercively deterred appeal, and this court must accept this assertion as true (at this time), plaintiff has had no forum. If this is plaintiff's only means of attack, it cannot justly be called collateral. Plaintiff can therefore seek declaratory judgment in this court.

II

As noted in Part I of this opinion if it appears that access to the appellate structure, could not have given MCAIC adequate relief,[8] it could be entitled to a declaration that the statutory scheme is unconstitutional.

On the other hand, should plaintiff carry its burden, would it be entitled to compensation for losses sustained? Under the circumstance here, it would not. Plaintiff relies, in its Count I claim for compensation, on inverse condem-

---

[8] The probability of relief must be real. An example of illusory relief is found in the State's argument that if MCAIC finds the industry-wide rate noncompensatory it could file on its own for a rate. It could, in the sense that nothing in the statute prevents the attempt. The State concedes, however, that a single company would be unable to present the statistical evidence necessary to command a rate decision. Yet another example of illusory relief is the possibility of an approved deviation from industry rates, *viz.* special dispensation for a particular company based on its special difficulties. (MCAIC has requested and the Commissioner granted a 7% upward deviation from ISO rates on three categories of insureds.) A deviation, however, places the company at a competitive disadvantage, thereby exacerbating its problems rather than solving them.

nation cases which involve real property. In those cases the government, through one means or another[9] drastically limited the uses the owner could make of its property. In all instances this came about through a governmental decision that some use other than that desired by the property owner was in the best public interest. The property owner had little or no control over this decision.

Plaintiff's position is radically different. Plaintiff owns a business which is part of a regulated industry. The purpose of the regulation is to provide New Jersey residents with insurance at reasonable rates, and to accomplish this purpose the regulators must keep the various participating companies alive and well. Plaintiff, for its part, undertook to do business and to continue in business knowing it would be regulated, that is, that its profits and operations would be circumscribed, but that it could count on the fact that the regulation would have plaintiff's own welfare as an integral part of its regulatory purpose. In these circumstances it is as much in the interest of the regulator as of the regulated that any malfunction in the system be attacked as vigorously and as fast as possible. MCAIC suffered losses; and those may have been caused by regulatory malfunction, which would, as stated above, entitled MCAIC to a declaratory judgment in order to permit the system to correct itself. But to obtain such a judgment MCAIC must act to seek the aid of a court. Had it done

---

[9] Regulation enacted by means of zoning or police power may have the same effect. See discussion in *San Diego Gas & Electric Co.* v. *City of San Diego*, U.S. , 49 L.W. 4317 (March 24, 1981).

so earlier, its losses would have been less, and the system would have been healthier. Everyone is the loser for plaintiff's failure to assert its rights at the earliest reasonable time. Only from and after the time plaintiff achieves a declaratory judgment that the regulatory scheme (as applied) is failing to provide an adequate rate, will plaintiff be entitled to claim that any further losses[10] constitute a taking without compensation.[11] Were this not so an industry subject to regulation or any regulated company could abandon the effort to function profitably secure in the knowledge that whenever it chose it could point to its accumulated losses, claim a taking, and force the State to make what amounts to a purchase of assets long lost. The purpose of the regulatory system would be defeated, the treasury emptied (the losses in this regulated industry alone are alleged to be 125 million a year) and the industry would receive an unwarranted windfall.

---

[10] See *Helmsley* the Supreme Court of New Jersey found landlords had not been able to demonstrate the constitutional inadequacy of the rate for previous years but could establish the rate would be confiscatory in years to come. Here plaintiff cannot demonstrate how much of its past loss is the result of failure to appeal, either with the administrative system, or without, as it does today.

[11] If plaintiff can demonstrate the inadequacy of the administrative review procedure it would also have a claim for declaration that it has been deprived of property without due process. *Helmsley, supra,* see also discussion in *San Diego Gas & Electric Co.* v. *City of San Diego, supra.*

III

In *In the Matter of the Valuation Proceedings under § 303(c) and 306 of the Regional Rail Reorganization Act*, 439 F.Supp. 1351 (Special Court, Regional Rail Reorganization Act 1977), Judge Friendly, discussed the nature of a claim for compensable unconstitutional erosion.[12]

> Unconstitutional erosion arises only when a losing business has been required to continue to operate against its will for more than a reasonable period. . . . [Two elements are implicit] namely, that the claimant should have made manifest its desire to quit operating and should have applied for authorization necessary to that end, and that some identifiable agency of government having power to do so should have thwarted its desires. [439 F.Supp. at 1356.]

In the present case, plaintiff has made no application to terminate its business. This circumstance would not of itself present an insurmountable barrier to recovery, for if this court finds either that (1) the difficulties of voluntary cessation, under the provisions of the "old act," or (2) the manifest impossibility of such cessation under the act as amended, made it futile to apply, we will not demand that plaintiff have done such

---

[12] Subsequent courts have relied on his definition. See, for example, *In the Matter of Penn. Cent. Transportation Co.*, 596 F.2d 1127, 1139 (3rd Cir. 1979).

futile act.[13] On this motion to dismiss (and not now deciding this issue), the court will assume plaintiff is correct and there was (and is) no way out.

An insurmountable barrier is presented, however, by the fact that plaintiff has indicated it did (and does) not seek a way out. Indeed, plaintiff sought in Count IV of its complaint to forestall an anticipated move by the Commissioner to put it out of business by way of a delinquency proceeding. Though plaintiff complains that the statutory format which places the Commissioner in charge of liquidating the company is unfair, it is surely clear that a company experiencing the rapid, steep decline that MCAIC alleges would cut its losses by *any* form of termination, no matter how far from ideal. By thwarting delinquency proceedings, then, MCAIC is itself

---

[13] *In Matter of Valuation Proceedings,* at 1364 Judge Friendly notes that in the leading case on erosion taking, *Brooks-Scanlon Company* v. *Railroad Commission of Louisiana,* 251 U.S. 396 (1920) "the railroad had ceased operating, initially with permission, but the . . . Commission . . . had ordered it to resume; Mr. Justice Holmes treated with contempt a suggestion that, despite the full hearing and order by the Commission directing a resumption of operation, the railroad must start a new proceeding with a petition for leave to discontinue which would surely be denied, 251 U.S. at 400." Judge Friendly goes on at 1372 to decide "enactment of the Rail Act should be taken as relieving the various trustees from any further obligation to apply for leave to abandon. As we pointed out in our [earlier] decision [the Act] . . . prohibited abandonments unless authorized by USRA and 'unless no affected . . . regional authority reasonably opposes such action,' a standard which would permit few, if any, abandonments."

responsible for a deepening of its deficit. As a more general proposition, it is clear that a losing company which fights to stay in business cannot be heard to assert that the refusal to let it cease such business is an injury, or that the bill for its accumulating losses must be borne by the government which failed to provide it the way out it would not have taken in any event.

If plaintiff amends its complaint to assert a desire to quit operating, then, and from that time forward only, a cause of action is stated, for only then can it be said that the terms of the statute force plaintiff to continue against its will.[14]

For the reasons stated above we hold that Count I states a claim for declaratory relief only. Counts II and III also state such a claim if amended to assert plaintiff's desire to quit business. We will grant the State's motion to dismiss all claims for compensation in all three counts.

Counsel for defendant should present an appropriate order under R. 4:42-1.

---

[14] Even then a question will be presented by the fact that it must be presumed, from plaintiff's pleadings that the Commissioner stood ready for some time to allow plaintiff to discontinue. *In Matter of Valuation Proceedings* at 1369-1387 the issue was how long after the company has applied to abandon (or been relieved of the obligation to do so by passage of the Rail Act, see footnote 13) may it be forced to await permission to do so before the delay constitutes a taking. This was an issue briefly discussed also in *Regional Rail Reorganization Act Cases*, 419 U.S. at 122-25, where the court notes that delay *might* be so excessive as to result in an erosion taking. It is the excessive lag period which may give rise to a claim. It seems improbable there would be delay of constitutional proportions here.

Order of the Superior Court of New Jersey, Chancery Division (Honorable William A. Dreier, J.S.C.) (July 6, 1981)

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION—MERCER COUNTY
Docket No. C 702-80E
Civil Action

MOTOR CLUB OF AMERICA INSURANCE COMPANY, a corporation of the State of New Jersey,

Plaintiff,

vs.

STATE OF NEW JERSEY, STATE OF NEW JERSEY DEPARTMENT OF INSURANCE and JAMES J. SHEERAN, NEW JERSEY COMMISSIONER OF INSURANCE,

Defendants.

This matter having been open to the Court by James R. Zazzali, Attorney General of New Jersey (Mark S. Rattner, Deputy Attorney General appearing), attorney for defendants, in the presence of Carpenter, Bennett & Morrissey, Esqs. (Stanley Weiss, Esq. appearing), attorneys for plaintiff, by motion pursuant to R. 4:6-2(e) for an Order dismissing the Complaint for failure to state a claim upon which relief can be granted; and the Court having con-

Order of the Superior Court of New Jersey, Chancery Division (Honorable William A. Dreier, J.S.C.) (July 6, 1981)

sidered the briefs and other papers in support of and in opposition to said motion and the argument of counsel; and the Court having issued a written opinion dated June 2, 1981, which is incorporated by reference herein; and further good cause appearing,

IT IS on this 6th day of July, 1981

ORDERED that

1. The defendants' motion to dismiss all claims for compensation contained in Counts I, II and III of the Complaint is granted;

2. the defendants' motion to dismiss Count I of the Complaint insofar as said Count I seeks declaratory relief is denied;

3. the defendants' motion to dismiss Counts II and III of the Complaint in their entirety is granted;

4. plaintiff is hereby granted leave to amend Counts II and III of its Complaint to affirmatively assert a desire to cease business;

5. Count IV of the Complaint is dismissed as moot; and

6. with respect to the Orders set forth in ordering paragraphs numbered 1, 3 and 5, the Court hereby determines that there is no just reason for delay and determines that said Orders are final judgments.

WILLIAM A. DREIER, J.S.C.

Order of Supreme Court of New Jersey Dismissing Appeal and Denying Petition for Certification (October 14, 1982)
(Filed—October 14, 1982)

SUPREME COURT OF NEW JERSEY
C-84 SEPTEMBER TERM 1982

20,188

MOTOR CLUB OF AMERICA INSURANCE CO., etc.,

Appellant-Petitioner,

vs.

STATE OF NEW JERSEY, DEPARTMENT OF INSURANCE, et al.,

Respondent-Respondent.

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-5084/5423-80T3 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs; and it is further

ORDERED that the appeal in the within matter is dismissed pursuant to R. 2:12-9.

Order of Supreme Court of New Jersey Dismissing Appeal and Denying Petition for Certification (October 14, 1982)

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 12th day of October, 1982.

STEPHEN TOWNSEND
Clerk

Notice of Appeal to the Supreme Court of the United States (December 29, 1982)

(Filed—December 29, 1982)

IN THE

SUPREME COURT OF THE STATE OF NEW JERSEY

No. 20,188

MOTOR CLUB OF AMERICA INSURANCE COMPANY, a corporation of the State of New Jersey,

Appellant,

vs.

STATE OF NEW JERSEY, STATE OF NEW JERSEY DEPARTMENT OF INSURANCE and JAMES J. SHEERAN, NEW JERSEY COMMISSIONER OF INSURANCE,

Respondents.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Motor Club of America insurance company, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New Jersey, entered on October 14, 1982, which judgment dismissed the appeal of Motor Club of America Insurance Company, and the effect of which was to affirm the June 28, 1982

judgment of the Appellate Division which directed the dismissal of Motor Club of America Insurance Company's Complaint in its entirety.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

CARPENTER, BENNETT & MORRISSEY
Attorneys for Appellant, Motor Club of America Insurance Company
By: ROBERT E. TURTZ
A Member of the Firm

Dated: December 28, 1982

CERTIFICATE OF SERVICE

I, Robert E. Turtz, a member in good standing of the Bar of the Supreme Court of the United States and of the State of New Jersey, hereby certify that on this day I caused a copy of this Notice of Appeal to the Supreme Court of the United States to be served upon the following pursuant to Rule 28.3 of the Rules of the Supreme Court of the United States, by mailing said document, properly addressed, by first-class mail:

Irwin I. Kimmelman
Attorney General of New Jersey
Attorney for Respondents,
State of New Jersey, State of New Jersey Department of Insurance and State of New Jersey Commissioner of Insurance

Notice of Appeal to the Supreme Court of the United States (December 29, 1982)

Attention: John J. Hayden, Esq.
Deputy Attorney General
R. J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625

All parties required to be served have been served.

ROBERT E. TURTZ

Dated: December 28, 1982

Verified Complaint (October 27, 1980)

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION—MERCER COUNTY
Docket No.
Civil Action

MOTOR CLUB OF AMERICA INSURANCE COMPANY, a corporation of the State of New Jersey,

Plaintiff,

vs.

STATE OF NEW JERSEY, STATE OF NEW JERSEY DEPARTMENT OF INSURANCE and JAMES J. SHEERAN, NEW JERSEY COMMISSIONER OF INSURANCE,

Defendants.

COUNT I

Plaintiff, Motor Club of America Insurance Company ("MCAIC"), a corporation organized and existing under the laws of the State of New Jersey, with offices at 484 Central Avenue, Newark, New Jersey 07107, by way of complaint against defendants, State of New Jersey; State of New Jersey Department of Insurance ("Department"); and James J. Sheeran, New Jersey Commissioner of Insurance ("Commissioner"), states as follows:

Verified Complaint (October 27, 1980)

1. MCAIC was incorporated in the State of New Jersey in 1928 under the name Motorists Casualty Insurance Company and assumed its present name in 1956.

2. Defendant, Department, is a principal department in the executive branch of the State Government of defendant, State of New Jersey.

3. Defendant, Commissioner, is the head and chief executive officer of the Department.

4. MCAIC is engaged in the insurance business and, with its subsidiary, Garden State Life Insurance Company, is authorized to write all lines of insurance, including fire and casualty insurance, life insurance, and allied lines. Although MCAIC writes many lines of insurance, its major business is automobile insurance; in 1979 more than 77% of its net premiums were on account of New Jersey automobile policies.

5. Since its inception in 1928, MCAIC has had a special relationship with New Jersey. Unlike many other insurance companies doing business in New Jersey, MCAIC has substantially limited its business activities in other states, concentrating its efforts toward best serving the insurance needs of the people of New Jersey, particularly in the automobile field. In 1979, by way of example, approximately 90% of MCAIC's net premiums were on account of New Jersey business, and most of this was on account of automobile policies.

6. MCAIC has been a leader in the New Jersey insurance industry, and it has enjoyed a favorable reputation, not only among New Jersey's insurance public,

but among its competitors as well. Therefore, for much of its history, MCAIC prospered as a relatively small, profitable insurance company that has been managed for its entire existence by members of a family that founded it and its corporate parent, Motor Club of America. MCAIC's success over the years was reflected in the fact that at year-end 1973, its surplus as to policyholders was $21,026,296 on a statutory insurance accounting basis and, on the basis of generally accepted accounting principles, its stockholders' equity was $26,098,990.

7. However, legislative and regulatory events, which became effective in 1973, resulted in drastic, adverse changes in the automobile insurance business climate of New Jersey, substantially increasing the losses and the inherent costs to all companies in writing and servicing policies and in paying claims. Specifically, these legislative events included the introduction into New Jersey law of compulsory motor vehicle liability insurance with a resultant influx of new but unprofitable business, and of "no-fault" insurance with unlimited, lifetime personal injury protection coverage; a very low medical bill threshold of $200 for bodily injury suits; and very limited rights of cancellation and nonrenewal of policies.

8. Despite the fact that "no fault" insurance was adopted on the theory that its costs would be borne by the ultimate consumer, *i.e.*, the insureds, in the form of fair and compensatory rates, such has not been the case in New Jersey. As a result of the ever increasing costs and loss experiences brought about, *inter alia*, by the "no fault" and compulsory insurance laws, and because of the regulatory framework requiring prior rate approval by the defendant, Commissioner, and the series

of policies and decisions of the defendant, Commissioner, which when viewed as a totality have been confiscatory in nature, the various rates charged by the insurance companies for New Jersey automobile insurance have been uncompensatory since at least 1974. Since at least 1974 companies, including MCAIC, have repeatedly applied to defendant, Commissioner, for permission to increase their respective rates to make them compensatory. Defendant, Commissioner, purportedly acting pursuant to N.J.S.A. 17:29A-7, has consistently delayed and denied or modified these requests and has arbitrarily left the New Jersey automobile insurance industry with wholly uncompensatory and inadequate rate structures.

9. The noncompensatory rate structures which defendant, Commissioner, forced upon the insurance companies, had the effect of making the companies increasingly reluctant to write new automobile business in New Jersey on a voluntary basis. Consequently, by 1975 the number of persons seeking automobile coverage through the Automobile Insurance Plan (known as the Assigned Risk Plan), which had been established by defendant, Department, pursuant to N.J.S.A. 17:29D-1, substantially increased, and the number continues to increase. In 1976 Government Employees Insurance Company ceased doing business in New Jersey and many of its 300,000 insureds eventually obtained insurance through the Assigned Risk Plan. As a result of the foregoing, and of other companies ceasing or limiting its business in New Jersey, aggravated by insolvencies of certain automobile insurance writers, both large and small, MCAIC's assignments from the Assigned Risk Plan increased from approximately 500 per month in 1976 to 3,000 per month before the end of 1979.

Verified Complaint (October 27, 1980)

10. Under the provisions of N.J.A.C., Title 11, Chapter 3, defendant, Commissioner, has established the rates which may be charged by insurance companies for insurance provided under the Assigned Risk Plan. Such rates are not compensatory to the insurance companies providing insurance through the Assigned Risk Plan. In the case of MCAIC, every dollar of premium received on account of Plan business results in the payout by MCAIC of in excess of $1.40.

11. Defendant, Commissioner's refusal and failure to permit reasonable and compensatory rates for voluntary and Assigned Risk Plan automobile policies have severely and negatively impacted all insurance companies writing automobile policies in New Jersey. As recently stated by Donald C. Brain, President of the Independent Insurance Agents of America, at that organization's convention in New Orleans (quoted in the Star Ledger of October 2, 1980, copy annexed hereto):

> Your [New Jersey's] regulatory authorities—and I refer to State Commissioner James J. Sheeran and Governor Brendan Byrne—have apparently decided on a policy of depressing state premium rates below those called for by experience in the marketplace . . . Commissioner Sheeran has been a little irresponsible in that sense . . . I'd characterize the situation as an attempt by an arm of the government in New Jersey to socialize the assets of insurance companies.

The effects of these policies on most insurance companies—doing substantial nonautomobile as well as profitable automobile business outside the State of New Jersey—have been limited principally to a lessening of their

overall profits. However, the effects upon MCAIC have been far more drastic. Because of MCAIC's almost exclusively New Jersey based business, concentrated in the automobile insurance line, MCAIC's inability to secure compensatory rates has resulted in (a) MCAIC incurring a series of substantial operating losses in the period 1974 through the present and (b) the erosion of MCAIC's surplus to policyholders at December 31, 1979 to $3,209,000 on a statutory basis and to $10,038,000 on a GAAP basis, notwithstanding contributions to MCAIC between 1976 and 1979 of $10,250,000 by MCAIC's parent company, Motor Club of America, and by other companies affiliated with MCA. But for these contributions (and absent any consideration of the value of MCAIC's present claim for damages in inverse condemnation asserted in this action), MCAIC would be insolvent, and its entire surplus destroyed. The plight of MCAIC has recently been described in an issue of *Best's Insurance Management Reports* (August 4, 1980), copy annexed hereto as follows:

> The company [MCAIC] offers a microcosmic look at the auto insurance situation in New Jersey as it has unfolded under the administration of Mr. Sheeran. MCA's [MCAIC] plight is worse than that of other companies only because its business is about 80% in New Jersey's auto insurance market. Lacking sufficient geographic and coverage spread, it has no cushion with which to withstand the crushing combination of a bad no-fault law and a regulatory philosophy that espouses consumerism above all.
>
> Despite the pullout of a number of companies from New Jersey and the glaring need for an adequate rate and reform of the no-fault law, Commis-

> sioner Sheeran has evinced little concern for the plight of the automobile insurers in his jurisdiction. The rationale appears to be that underwriting profits from other lines and other states can carry the New Jersey burden.
>
> • • •
>
> Unlike GEICO, Nationwide, SAFECO and others that have done so, MCA [MCAIC] has no option to withdraw from the state.

As a result of defendants' confiscatory regulatory policies and decisions, MCAIC's assets and equity have been seriously eroded, its earning power has been largely destroyed, and the fair market value of its business has been drastically diminished. Recent attempts to sell the company to, or merge it with, a responsible acquirer have been unsuccessful because of acquirer concerns about defendants' confiscatory regulatory policies and decisions.

12. MCAIC has repeatedly called its plight to the attention of defendant, Commissioner, and it has repeatedly sought rate and related regulatory relief. While some relief has been forthcoming, it has consistently been too little and too late to reverse MCAIC's operating losses or to assure MCAIC a fair opportunity to earn a reasonable return on its investment.

13. The continuing losses which MCAIC has experienced since 1974 have been caused by New Jersey's confiscatory statutory and regulatory framework and the confiscatory regulatory policies and decisions of defendant, Commissioner. By virtue of the foregoing, MCAIC's property has been taken by the State of New Jersey for a public use without just compensation in violation of the

Fourteenth Amendment of the United States Constitution and Article I, Paragraph 20 of the New Jersey Constitution.

WHEREFORE, plaintiff, Motor Club of America Insurance Company, demands judgment in its favor and against defendants as follows:

1. determining that defendants have taken plaintiff's property for a public use entitling plaintiff to just compensation;

2. awarding plaintiff just compensation for the taking of its property;

3. for interest, costs of suit, and attorneys' fees; and

4. for such other and further relief as the Court may determine to be just in the circumstances.

COUNT II

14. Plaintiff, MCAIC, repeats each and every allegation of Paragraphs 1 through 13 of Count I and incorporates them herein by reference.

15. It is the law of the land, as enunciated in the context of another regulated industry in the seminal case of *Brooks-Scanlon Co.* v. *R.R. Comm'n.*, 251 U.S. 396, 399 (1920), that:

> A carrier cannot be compelled to carry on even a branch of business at a loss, much less the whole business . . . If the plaintiff be taken to have granted to the public an interest in the use of the railroad, it may withdraw its grant by discontinuing the use when that use can be kept up only at a loss.

MCAIC has been converted from a profitable enterprise to a losing venture by the cumulative impact of defendants' legislative and administrative regulations. But, even apart from this impact, defendants have also unconstitutionally denied MCAIC its right to withdraw its assets from the public use and to dispose of them in a manner consistent with the interests of its creditors and shareholders. When governments so act, they are required under the principles set forth by the United States Supreme Court in *Rail Act Cases*, 419 U.S. 102 (1974) to pay compensation for the "erosion taking" of property that has occurred.

16. Prior to June 3, 1975, a domestic insurance company had the right, pursuant to N.J.S.A. 17:30-8, to voluntarily dissolve and liquidate its assets upon compliance with the terms of that statute. That statute, along with the balance of Chapter 30 of Title 17, was repealed, effective June 3, 1975 by L. 1975 c.113 §31. In its place was substituted N.J.S.A. 17:30C-1 through 17:30C-30, "An Act Concerning the Rehabilitation and Liquidation of Certain Insurers" (hereinafter the "Liquidation Act"). N.J.S.A. 17:30C-3 provides that delinquency proceedings pursuant to the Liquidation Act ". . . shall constitute the sole and exclusive method of liquidating . . . . an insurer"; and only defendant, Commissioner, may institute such proceedings. Therefore, since June 3, 1975, MCAIC has not had the right to voluntarily dissolve or liquidate; and the defendants have effectively controlled the destiny of MCAIC—both as to whether it would be permitted to operate profitably and as to when its operations would be brought to a halt and on what terms. Defendants have, therefore, caused MCAIC to incur substantial losses in its operations, compelling it to continue in business with such loss operations, thereby drastically eroding its assets, earning power and marketability.

17. By virtue of the foregoing, MCAIC's property has been taken by the State of New Jersey for a public use without just compensation in violation of the Fourteenth Amendment of the United States Constitution and Article I, Paragraph 20 of the New Jersey Constitution.

WHEREFORE, plaintiff, Motor Club of America Insurance Company, demands judgment in its favor and against defendants as follows:

1. determining that defendants have taken plaintiff's property for a public use entitling plaintiff to just compensation;

2. awarding plaintiff just compensation for the taking of its property;

3. for interest, costs of suit, and attorneys' fees; and

4. for such other and further relief as the Court may determine to be just in the circumstances.

COUNT III

18. Plaintiff, MCAIC, repeats each and every allegation of Paragraphs 1 through 13 of Count I and incorporates them herein by reference.

19. The right to withdraw its assets from the public use that MCAIC had prior to June 3, 1975 was rendered largely illusory by defendants' regulatory system and the business arrangements MCAIC had to enter into to operate under such system. As a consequence, the process of withdrawing from operations and liquidating was so difficult, so time

consuming, and so destructive of the remaining values of the enterprise as to preclude such a course of action from the range of reasonable business decision.

20. By virtue of the foregoing, MCAIC's property has been taken by the State of New Jersey for a public use without just compensation in violation of the Fourteenth Amendment of the United States Constitution and Article I, Paragraph 20 of the New Jersey Constitution.

WHEREFORE, plaintiff, Motor Club of America Insurance Company, demands judgment in its favor and against defendants as follows:

1. determining that defendants have taken plaintiff's property for a public use entitling plaintiff to just compensation;

2. awarding plaintiff just compensation for the taking of its property;

3. for interest, costs of suit, and attorneys' fees; and

4. for such other and further relief as the Court may determine to be just in the circumstances.

COUNT IV

21. Plaintiff, MCAIC, repeats all of the allegations of Paragraphs 1 through 20 of the Complaint and incorporates them herein by reference.

22. Pursuant to N.J.S.A. 17:30C-3, the Liquidation Act provides the sole and exclusive method of liquidating,

rehabilitating . . . an insurer, and only defendant, Commissioner, may institute such action.

23. Pursuant to N.J.S.A. 17:30C-7a. and 17:30C-9a., a rehabilitation order and a liquidation order shall, respectively, direct the Commissioner to take possession of the property of the insurer. Furthermore, whenever a receiver is to be appointed in delinquency proceedings, N.J.S.A. 17:30C-15a. requires the appointment of Commissioner as such receiver.

24. Pursuant to N.J.S.A. 17:30C-6a. and 17:30C-8, the defendant, Commissioner, may commence delinquency proceedings looking toward rehabilitation or liquidation if the insurer is impaired or insolvent. By letters dated September 29, 1980 and October 10, 1980, defendant, Commissioner, has advised MCAIC that he has concluded that MCAIC's capital was impaired as at June 30, 1980.

25. By virtue of the foregoing there is a material risk that defendant, Commissioner, will commence delinquency proceedings against MCAIC in the near future on the ground that it is allegedly impaired and that defendant, Commissioner, will in said proceedings be appointed receiver for MCAIC.

26. The commencement of such delinquency proceedings will cause irreparable injury to MCAIC in the following respects:

(a) it will deliver actual possession of the assets and business of MCAIC to the defendant, Commissioner, whose policies and decisions over the past six years have converted MCAIC from a profitable enterprise to a losing venture. Such delivery

of possession will constitute the final step in the creeping condemnation of MCAIC's assets and business, which have been occurring over the past six years, without a correlative deposit of the fair value of such assets and business necessary to assure the constitutionality of the final and complete taking that will occur;

(b) the defendant, Commissioner, will be placed in a position of irreconcilable conflict of interest with respect to two principal responsibilities of any receiver in such a proceeding. The first responsibility would be to seek the rehabilitation of MCAIC which would require the prosecution of litigation in an appropriate forum against the defendant, Commissioner, to obtain the regulatory relief which can assure MCAIC's continued viability and which the defendant, Commissioner, is required by constitutional principles to grant under the present circumstances. The second responsibility will be to aggressively prosecute the within litigation to recover for MCAIC the damages to which it is entitled for the erosion takings set forth above in Counts I through III of this Complaint. The defendant, Commissioner, obviously is not in a posi- to fulfill either of those responsibilities; and there is no reason to expect that such undertakings could or should be adequately financed by other interested parties;

(c) it will destroy MCAIC's reputation and goodwill; it will result in the cancellation of MCAIC's multistate licensing (one of its principal remaining assets developed over many years); it will severely undermine employee and management morale; and

it will destroy all reasonable chance for MCAIC to assure its continued viability.

27. The commencement of such delinquency proceedings is unnecessary because:

(a) MCAIC denies that its capital was impaired at June 30, 1980 and further states that if any such impairment arises in later periods, it will use its best efforts to cure same. Among the measures available to it are the sale of assets at prices in excess of book value, the negotiation of reinsurance arrangements, and the potential of receiving additional contributions from its corporate parent;

(b) MCAIC will promptly seek to review in an appropiate forum the defendant, Commissioner's refusal to grant the regulatory relief which MCAIC has been seeking. Projections prepared for MCAIC, and thoroughly reviewed by defendants, indicate that such relief would put an end to MCAIC's losses and assure its continued viability; and

(c) MCAIC is presently conducting its business in the ordinary course and paying all valid claims in a timely fashion; and it expects to continue to do so for the foreseeable future.

28. MCAIC, therefore, respectfully prays that defendant, Commissioner, be enjoined from commencing such delinquency proceedings pending the completion of each of the following:

(a) a determination as to whether N.J.S.A. 17:30C-1, *et seq.* is unconstitutional as applied to MCAIC for the reasons set forth in Count II above, which determin-

ation can and should be promptly made since the material facts bearing on the issue should not be in dispute;

(b) a determination as to whether the application of N.J.S.A. 17:30C-1, *et seq.* to MCAIC would unconstitutionally deprive it of its due process of law because, under the present circumstances, such application would require placing defendant, Commissioner, in a position of irreconcilable conflict of interest;

(c) a determination as to the amount of compensation to which MCAIC is entitled by virtue of the erosion taking set forth in Counts I through III above, which determination is required to properly assess MCAIC's present financial condition;

(d) a determination as to whether MCAIC has suffered an impairment in its capital which cannot be promptly corrected;

(e) the results of MCAIC's efforts to obtain in another judicial forum appropriate regulatory relief which will assure its continued viability; and

(f) a determination as to whether the application of delinquency proceedings to MCAIC would constitute a taking of the assets and business of MCAIC requiring a deposit sufficient to pay for the fair value of the assets and business so taken for the public use.

WHEREFORE, plaintiff, Motor Club of America Insurance Company, demands judgment in its favor and against defendants as follows:

Verified Complaint (October 27, 1980)

1. temporarily, preliminary and finally enjoining defendant, Commissioner, from commencing delinquency proceedings against plaintiff, MCAIC, under the Liquidation Act, N.J.S.A. 17:30C-1 through 17:30C-30;

2. temporarily, preliminarily and finally enjoning defendant, Commissioner, from taking possession of any property of MCAIC or from being appointed receiver of MCAIC in the event that delinquency proceedings of any sort should be commenced against plaintiff MCAIC.

3. declaring that MCAIC is neither impaired nor insolvent;

4. for costs of suit and attorneys' fees; and

5. for such other and further relief as the Court may determine to be just in the circumstances.

CARPENTER, BENNETT & MORRISSEY
Attorneys for Plaintiff, Motor Club of America Insurance Company

STANLEY WEISS
ROBERT E. TURTZ
Members of the Firm
By: STANLEY WEISS

Verified Complaint (October 27, 1980)

VERIFICATION

STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } ss.:

David Green, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am President of plaintiff, Motor Club of America Insurance Company ("MCAIC"), and I am personally familiar with the factual allegations set forth in the Compaint. The facts set forth therein are true of my own knowledge.

DAVID GREEN

Sworn to and subscribed
before me this 20th day
of October, 1980

JEAN A. HEINZE
Notary Public of New Jersey
My Commission Expires April 3, 1985

Exhibit A to Verified Complaint

Star Ledger, October 2, 1980

AGENTS ACCUSE STATE OF DRIVING UP RATES

By Alexander Milch

NEW ORLEANS—New Jersey motorists buying automobile insurance are in effect being subsidized by the rest of the country, Donald C. Brain of Kansas City, president of the Independent Insurance Agents of America (IIAA) charged yesterday.

In an interview at the 84th annual IIAA convention here, Brain said that "politically motivated" low premium rates imposed by New Jersey force insurance companies remaining in the state to make up for their losses by use of retained earnings, which in turn must be rebuilt by higher premium levels elsewhere.

"Your regulatory authorities—and I refer to State Commissioner James J. Sheeran and Governor Brendan Byrne —have apparently decided on a policy of depressing state premium rates below those called for by experience in the marketplace," he said. "Commissioner Sheeran has been a little irresponsible in that sense."

• • •

"I'd characterize the situation as an attempt by an arm of the government in New Jersey to socialize the assets of insurance companies."

Brain said that he has become quite familiar during his year in office with the auto insurance crisis in New Jersey, which the industry claims is the country's worst.

Exhibit A to Verified Complaint

Many companies have pulled out of the state, he said, because authorities won't permit them to charge enough to make up for underwriting losses.

Those companies which have stayed on despite their losses often minimize coverage as much as possible and don't introduce new products which are made available elsewhere in the country, he said.

Reluctance of companies to underwrite voluntary business has increased the population of the assigned risk plan in New Jersey to more than 35 per cent of all motorists as against 1.5 per cent in Missouri, his home state, Brain said.

Unlike New Jersey, which mandates prior approval by the state insurance commissioner before insurance companies can change their rates, Missouri permits changes by companies, subject to later review by the state.

Under assigned risk, companies take turns in issuing policies to motorists unable to obtain coverage in the regular marketplace.

As an immediate help to the New Jersey situation, the legislature there should adopt a "verbal threshold," under which pain-and-suffering suits would be limited to specific serious injuries and to disabilities lasting over specified periods of time, he said.

Lawyers opposing the verbal threshold are doing so for "selfish reasons," Brain said. Litigation is now possible whenever medical costs of an accident victim exceed $200.

Brain had high praise for the Independent Insurance Agents of New Jersey for fighting for a verbal threshold.

Exhibit A to Verified Complaint

It is an example of why insurance regulation should be kept on a state rather than a federal level, he said.

Speakers at yesterday's convention session including Robert E. Merriman, president of Acord Corp. of Oradell, N.J. which designs and prints industry-wide forms for insurance claims and other purposes.

It was announced that the new joint advertising program of insurance companies and the IIAA has raised $5 million for advertising in opposition to direct writers. The latter employ their own workers to sell insurance, while regular insurance companies sell through independent agents.

Exhibit B to Verified Complaint

(Opposite) ☛

BEST'S INSURANCE MANAGEMENT REPORTS

Property/Casualty
Release No. 9
August 4, 1980

A.M. Best Compan
Oldwick, N.J. 0885
201-439-2200

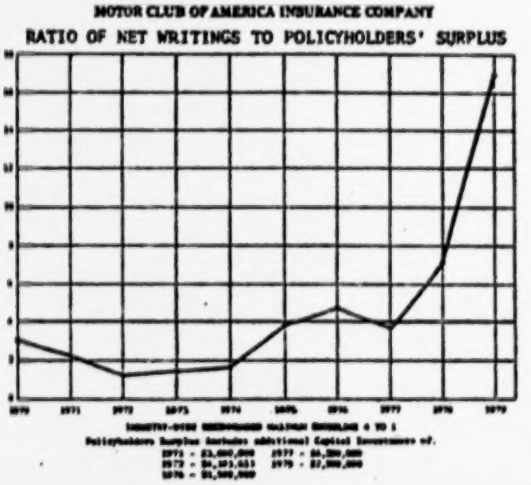
Financial News | Washington Review | Statistical Studies | Perspectives

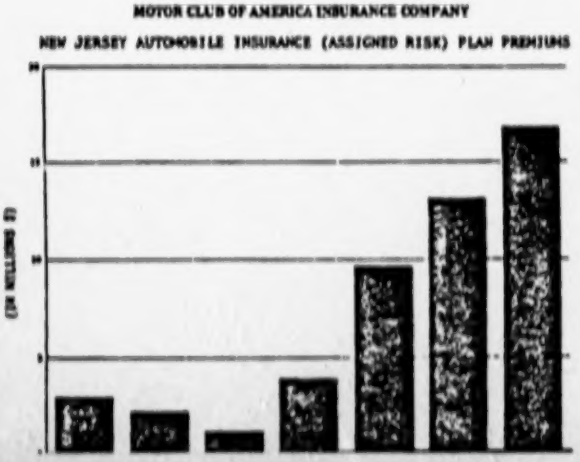
Preliminary "Special Report" on New Jersey Auto Insurer Is Due Next Week

Next week, Kramer Capital Consultants is scheduled to present its preliminary report on the condition of Motor Club of America Insurance Company to New Jersey insurance commissioner James J. Sheeran. The report, which will describe the findings of a "special audit," is being conducted at the request of the commissioner but at the expense of the insurer and is supposed to determine how much "extraordinary relief" the commissioner should grant MCA. The company is requesting an auto insurance rate increase of 31.7%, permission to non-renew its assigned risk customers, a continuation of its moratorium on acceptance of new assigned risks, and permission to refuse to renew certain of its voluntary business. This special review by Kramer was ordered by the commissioner despite the presence of department examiners at MCA since October 1979.

A special audit isn't needed to show that the situation at MCA is serious. The company offers a microcosmic look at the auto insurance situation in New Jersey as it has unfolded under the administration of Mr. Sheeran. MCA's plight is worse than that of other companies only because its business is about 80% in New Jersey's auto insurance market. Lacking sufficient geographic and coverage spread, it has no cushion with which to withstand the crushing combination of a bad no-fault law and a regulatory philosophy that espouses consumerism above all.

Despite the pullout of a number of companies from New Jersey and the glaring need for an adequate rate and reform of the no-fault law, Commissioner Sheeran has evinced little concern for the plight of the automobile insurers in his jurisdiction. The rationale appears to be that underwriting profits from other lines and other states can carry the New Jersey burden. Legislative, regulatory and pricing constraints are such that virtually no new voluntary auto policies are written in the New Jersey market. New drivers, with rare and ever-decreasing exception, go directly into the New Jersey Automobile Insurance Plan, so that, at this point, some 40% of the insured drivers in the state are assigned risks.





The state has a compulsory no-fault law that has been termed the worst in the country – it contains an extremely low ($200) tort threshold coupled with an unlimited medical provision, so that suits abound and catastrophic losses have become considerably more numerous. At the same time, thanks to recent legislation, assigned risk policies provide liability coverage up to a $100,000/$300,000 limit, an amount that assures assigned losses will be "too big to eat." Overseeing this conglomeration of laws and rules that almost seem designed to produce an underwriting loss is an insurance commissioner who has steadfastly refused to approve rates commensurate with the coverages provided. In the case of the Motor Club, with auto insurance as the primary business and with 40% of that business coming in as assigned risks, the consequences have been disastrous.

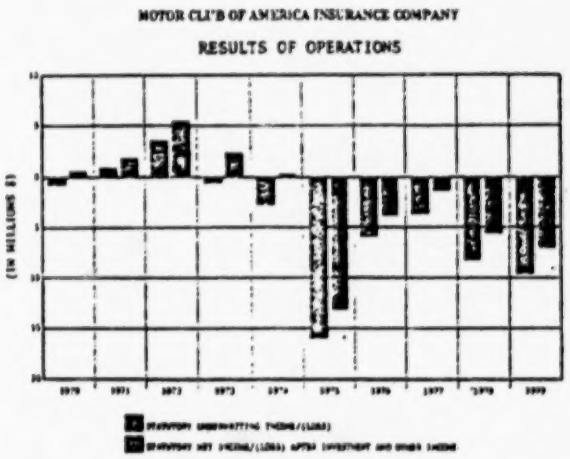
Since 1971 the management of MCA Insurance Co. has found it necessary and has been able to add nearly $18 million

to the company's capital and surplus; but all of that money, plus investment gains, plus income tax recoveries arising out of underwriting losses, has been lost in the auto market – and on top of that, policyholders' surplus has been drained during the period from just under $7 million at the start of 1971 to $3.2 million at the close of 1979.

MCA's current premiums written-to-surplus ratio is 17 to1, a figure that would boggle most minds – but not that of Mr. Sheeran, who when told by MCA that Connecticut was about to order the company to withdraw from that state because writings to surplus were so far out of line, responded that such ratios "don't mean a damn thing to me." MCA solved its Connecticut difficulty by putting up an escrow account and it is running off that business.

Considering the circumstances prevailing in New Jersey, infusion of more money into MCA Insurance would be a highly questionable, if not reckless, action. In the absence of rate or underwriting concessions, a buy-out of the holding company's auto club and other assets and discontinuance and run-off of the insurance operation seem to be the only ways to avoid a major insurance company insolvency.

Commissioner Sheeran was quoted in a Newark newspaper as admitting that MCA's failure "would have a material impact on my ability to maintain orderly markets in the automobile insurance lines." He has proclaimed the special audit by Kramer to be a "rescue mission" for MCA. Unlike GEICO,



Nationwide, SAFECO and others that have done so, MCA has no option to withdraw from the state.

It is difficult to see how the interests of the public, the industry or the State of New Jersey could be served if MCA is put into rehabilitation. While the loss of the company could prompt rate and regulatory reform, it would be at the expense of throwing more than 100,000 drivers onto a contracting market and raising questions about the adequacy of state insurance regulation.

©Copyright 1980 by
A. M. Best Company, Inc., Oldwick, New Jersey 08858

Affidavit of David Green (November 12, 1980)

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION—MERCER COUNTY
Docket No. C 702-80E
Civil Action

MOTOR CLUB OF AMERICA INSURANCE COMPANY, a corporation of the State of New Jersey,
Plaintiff,

vs.

STATE OF NEW JERSEY, STATE OF NEW JERSEY DEPARTMENT OF INSURANCE and JAMES J. SHEERAN, NEW JERSEY COMMISSIONER OF INSURANCE,
Defendants.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } ss.:

DAVID GREEN, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am David Green, and reside at 15 Lowell Place, West Orange, New Jersey. I was graduated from Lehigh University in 1922 with a Naval Engineering Degree and obtained an LL.B degree in 1926 from Rutgers University

Affidavit of David Green (November 12, 1980)

Law School. I was admitted in New Jersey as an Attorney-at-Law in 1925 and as a Counsellor-at-Law in 1928. I was an original incorporator and founder of Motor Club of America and Motor Club of America Insurance Company and have been an officer and director of both for many years. Since 1954, I have served as President and General Counsel of both Companies and their affiliates.

2. My affiliations with the insurance industry are as follows:

a) Vice Chairman of the Committee on Automobile Insurance Law of the Insurance Section of the American Bar Association, and the first automobile insurance editor of "The Forum";

b) Member of National Conference of Lawyers, Insurance Companies and Adjusters since 1960. Co-Chairman 1975-1977;

c) Member of the Federation of Insurance Counsel and its Secretary-Treasurer in 1962-1963, President 1964-1965 and Chairman of the Board 1965-1966;

d) Member of the Board of Governors of the National Association of Independent Insurers, since 1953, and its President in 1962-1963;

e) Elected as a Member of the Board of Directors of the New Jersey Insurance Underwriting Association (FAIR PLAN), pursuant to NJSA 17:37A-5, since its inception in 1968, and have been elected as the Chairman of the Board of Directors since 1975;

f) Elected as a member of the Board of Directors of the New Jersey Property-Liability Insurance Guaranty Association, pursuant to NJSA 17:30A-7, since its incep-

tion in 1974, which election has been subject to the approval of the Commissioner of Insurance, and presently am the Treasurer of the Association;

g) Elected as a member of the Governing Committee of the New Jersey Automobile Insurance Plan, pursuant to NJAC 11:3-1.4 since 1972, and prior thereto as a member of the Governing Committee which administered the Assigned Risk Plan;

h) Appointed by the defendant Commissioner of Insurance as a director of the Board of the Special Joint Underwriting Association pursuant to NJSA 17:30B-6, since its inception in 1974;

i) Appointed in 1977 by the President of the New Jersey Senate as a member of the No-Fault Study Commission;

j) Trustee of the New Jersey State Safety Council since 1974; and

k) Member in 1976-1977 of the Advisory Board of the National Insurance Development Program, appointed by the Secretary of Health, Education and Welfare.

I have also received the following awards: Defense Research Institute Service Award in 1968; Insurance Man of the Year from the Brokers Association of New Jersey in 1975; the New Jersey State Bar Association Service Award in 1972; the Lehigh University Alumni Award in 1972, and the Federation of Insurance Counsel Man of the Year Award in 1974.

3. Motor Club of America was incorporated in New Jersey in 1933 as "Automobile Association of New Jersey", the successor to a New Jersey corporation organized

in 1926. The name Motor Club of America was adopted in 1958. Since 1926, Motor Club of America has operated a motor club and since 1946, Motor Club of America has offered financing and travel services related to its motor club operations. Motor Club of America, through a subsidiary, Moderncare Centers of America, Inc., opened a rehabilitation hospital in February 1975. Motor Club of America was founded by members of the Green Family, who have served as directors and key officers in the management of all Motor Club of America Companies.

4. Motor Club of America Insurance Company (the plaintiff in this action) was founded in 1928 as "Motorists Casualty Insurance Company." The present name was adopted in 1956. Motor Club of America owns 92.9% of the Common Stock of Motor Club of America Insurance Company, which, in turn, owns 98.6% of the Capital Stock of Garden State Life Insurance Company, a New Jersey life insurance company which isued its first policies in 1957.

5. There are 13 members of the Board of Directors of Motor Club of America Insurance Company, five of whom are members of the Green Family. Of the non-family members of the Board, all except the head of the Electronic Data Processing Department have been with the Company since at least 1950.

6. Both Motor Club of America and Motor Club of America Insurance Company are public companies whose Common Stock is sold in the NASDAQ Over-the-Counter List. Over 60% of the Common Stock of Motor Club of America is owned by public stockholders and approximately 7% of the Common Stock of plaintiff is so owned.

Affidavit of David Green (November 12, 1980)

7. The Common Stock of Motor Club of America traded as high as 29½ in the second quarter of 1972 and the Common Stock of plaintiff traded as high as 18 in the third quarter of 1972. During 1980, the highest bid price of Motor Club of America's Common Stock was 4¼, and the lowest was 1⅝, and the highest bid price of Motor Club of America Insurance Company's Common Stock was 4, and the lowest was 1¾.

8. Motor Club of America has been attempting to find a responsible purchaser or merger partner for the plaintiff or the parent's entire enterprise. The efforts to date have been unsuccessful, and the principal reason for the lack of success has been the reluctance of potential purchasers to become involved in the automobile insurance business in New Jersey under its existing system. For example, the chief executive officer of a major company, with whom we had such discussions, has informed me that his company will stay out of New Jersey until the regulatory climate improves substantially, if it ever does. He cited the defendant Commissioner's failure to respond quickly and effectively to our requests for relief submitted in March 1980. He indicated that the analysis of A. M. Best Co. Inc. in its Management Report dated August 4, 1980 (copy of which is attached to the Complaint as Exhibit B) was correct—i.e., that after adding so many millions in new capital, just to see it drained away by the New Jersey system, to further put capital into Motor Club of America Insurance Company seems like "a highly questionable, reckless action".

9. The surplus as to policyholders of plaintiff at December 31, 1973 was $21,026,296 on a statutory insurance accounting basis and, on the basis of generally

accepted accounting principles, its stockholders' equity was $26,098,990. Notwithstanding the infusion of $10,250,000 by the parent, Motor Club of America, and its subsidiaries during the intervening years, at December 31, 1979, the surplus as to policyholders of plaintiff was $3,209,187 on a statutory insurance accounting basis and, on the basis of generally accepted accounting prinicples, its stockholders' equity was $10,038,098.

10. Prior to the mid-1970's, the MCA Companies and the MCA Insurance Companies grew and prospered. Motor Club of America Insurance Company reported positive net income over a protracted period of time. However, commencing in 1975, Motor Club of America Insurance Company began reporting losses and in the period 1975-1979 incurred losses totalling $31,630,808 on a statutory basis and $25,093,620 on a generally accepted accounting principles basis.

11. In my opinion, the erosion of earning power, surplus and marketability reflected in paragraphs 7, 8, 9 and 10 above, was caused by the dramatic legislative changes in New Jersey applicable to the automobile insurance business introduced in the mid 1970's, and the nature of the administration of those laws and others by the defendant Department. Specifically:

a) Effective January 1, 1973, automobile and motor vehicle liability insurance became compulsory, resulting in an influx of new but unprofitable business;

b) No-Fault insurance with unlimited lifetime personal injury protection coverage, with a very low medical bill

threshold of $200 for bodily injury suits, also became effective January 1, 1973;

c) To the statutorily mandated limitations on cancelling automobile insurance policies within the term of the policy, effective January 1, 1973, automobile insurers were required to renew all policies with the same coverages, subject to limited exceptions permitted by regulation;

d) In June 1975, the right of a domestic insurance company to voluntarily dissolve and liquidate its assets was withdrawn;

e) The unforeseen developments in the Automobile Insurance Plan resulted in an increase of assignments from 500 per month in 1976 to 3,000 per month in 1979;

f) There were a series of rate decisions by the defendant Commissioner, not only for the business which is voluntarily written, but also for business which is written in the residual market (the New Jersey Automobile Insurance Plan, for example), which in summary generally have provided "too little and too late"—and were issued under coercive circumstances, as illustrated by the events recited in the affidavit of William Irwin, filed contemporaneously herewith.

12. The changes in the regulatory environment introduced in the mid 1970's and enumerated above, added to a full system of regulation then existing which controlled (a) the amounts of capital and surplus required to do business, (b) the nature of investments which could be made, (c) the rates which could be charged by requiring the prior approval, (d) the form and provisions of insurance contracts, (e) changes in ownership and control of insurance companies, and (f) holding company insurance transactions. The effect of this system, as

supplemented by the developments enumerated in paragraph 11 above, has placed the destiny of a domestic insurance company servicing the New Jersey auto market into the hands of the State. The State decides the nature of the product to be sold, the persons to whom it is sold, the price at which it is sold, and decides as well whether, when and on what terms such a company may be liquidated, rehabilitated or transferred.

13. My opinion, stated above, that the erosion in plaintiff's earning power, net worth and marketability has been caused by the State's regulatory system, is supported by:

(a) the pervasiveness of the State's control over plaintiff's destiny, as indicated in paragraphs 11 and 12 above,

(b) the experience of other carriers under that system, which has been described in the affidavit of Robert J. Schraeder, submitted simultaneously herewith,

(c) the conclusions of the defendant Insurance Commissioner's own consultants, Kramer Capital Consultants, Inc., who in its report filed October 27, 1980, stated:

> "Until the early 1970's MCA was generally a profitable operation. However, changes in the auto insurance environment and MCAIC's reliance on one line of business in one state began to negatively impact the insurance company in 1974. Since then, MCAIC has incurred heavy underwriting losses which have translated into reduced surplus for the insurer and in earnings deficits for both MCAIC and MCA."

Affidavit of David Green (November 12, 1980)

While plaintiff has considerable reservations concerning the purposes, fairness and accuracy of the Kramer Capital Consultants, Inc. report, its observations quoted above underscore the obvious fact that it is the "changes in the auto insurance environment" which has converted plaintiff from a profitable enterprise to a losing venture,

(d) my personal knowledge that plaintiff's present circumstances have been brought about by the impossibility of profitably adapting to the regulatory change which has occurred in New Jersey since the mid-1970's. We have felt the impact of these changes more severely than others, for obvious reasons. Although Motor Club of America Insurance Company writes many lines of insurance, its major business is automobile insurance and, in 1979, more than 77% of its net premiums were on account of New Jersey automobile insurance policies, thus plaintiff has neither profitable automobile insurance outside of the State of New Jersey nor a sufficient amount of non-automobile insurance to offset the New Jersey automobile insurance losses. During the years 1975-1979, Motor Club of America Insurance Company lost $31,634,621 from its automobile insurance business, more than wiping out the surplus it had accumulated over the years. Many foreign insurance companies have acted in the past few years in various ways in order to stop or lessen automobile insurance losses in New Jersey. Such action included the withdrawal of insurance companies from writing all business in New Jersey, to the cancellation of agents' contracts, to the decision not to write any new automobile insurance policy in New Jersey. The law has precluded plaintiff from ceasing its business operations.

Affidavit of David Green (November 12, 1980)

14. I do wish to comment upon the present financial circumstances of plaintiff. In the Quarterly Statement as of June 30, 1980 of Motor Club of America Insurance Company, dated August 8, 1980 and filed with the defendant Department of Insurance, the surplus as regards policyholders was $2,420,677. In an Inventory of the Assets, Liabilities and Surplus of the Motor Club of America Insurance Company as of June 30, 1980, which is dated August 14, 1980, certain adjustments for special evaluations were made by defendant Insurance Department examiners, resulting in an allegation that the surplus as regards policyholders as at June 30, 1980 actually was $1,247,956, or $1,172,721 less than as reported by Motor Club of America Insurance Company. There would be an impairment in the capital of Motor Club of America Insurance Company in the event the surplus as regards policyholders was below $2 million. Thus, a dispute exists as to our accounting at June 30, 1980.

15. As public companies, both Motor Club of America and Motor Club of America Insurance Company must prepare and file with the Securities and Exchange Commission financial statements prepared in conformity with generally accepted accounting principles, which, as to Motor Club of America Insurance Company and Garden State Life Insurance Company, vary from reporting practices prescribed or permitted by defendant Department of Insurance. The major differences between statutory accounting and generally accepted accounting principles follows. (Other differences between the two methods of accounting, in the aggregate, are not material):

(i) For both generally accepted accounting principles and statutory accounting, insurance premiums are taken into income on a pro rata basis over the lives

of the policies. However, under statutory reporting, the expenses in connection with such premiums (such as commissions, premium taxes and certain other underwriting expenses) are charged to expense at the time the policy is written, instead of being matched with the premiums over the life of the policies. Under generally accepted accounting principles, such expenses are deferred and amortized to expense over the same period as the related premium income;

(ii) In addition, certain assets and liabilities, such as furniture and fixtures, prepaid expenses, certain past due receivables and deferred taxes are not recognized as assets or liabilities for statutory reporting purposes.

Under generally accepted accounting principles, plaintiff's stockholders' equity at June 30, 1980 was $8,528,001.

16. Thus the circumstances of plaintiff's surplus as of June 30, 1980 are that the surplus (net worth) is well in excess of $2 million on a generally accepted accounting principles basis, and that on a statutory basis the plaintiff shows a surplus of approximately $2.4 million and the defendant Department's examiner claim approximately $1.2 million. However, even if the defendant Department's examiners were correct in their adjustments, and Motor Club of America Insurance Company questions this, there are methods by which any such impairment can be corrected. These methods include: (a) Obtaining reinsurance, quota share, or surplus relief treaties, which transfers to the reinsurer the expenses incurred at the time the policies were written (which as noted in paragraph 15 must be expensed

at the outset for statutory purposes). Thus, the surplus is increased in the full amount of the transferred expense; (b) Gains or sales of assets owned by Motor Club of America Insurance Company at prices in excess of statutory book value; e.g. it is generally conceded that the market value of Garden State Life Insurance Company, a subsidiary of plaintiff, is at least $2 million to $4 million in excess of statutory book value; (c) Infusing capital from the parent corporation and affiliates or from other sources, including potential purchasers or merger partners; and (d) Future earnings from operations which Motor Club of America Insurance Company would receive if it obtained the reguatory relief to which it is entitled.

17. Motor Club of America Insurance Company presently is able to operate its business in the ordinary course; its cash position is strong; it is paying claims on a timely basis; and there is no current threat to policyholders, claimants or the New Jersey public. Motor Club of America Insurance Company files on a quarterly basis financial statements not only with the defendant Department of Insurance on a statutory insurance accounting basis, but also with the Securities and Exchange Commission on a generally accepted accounting principles basis. Its calendar year financial statements filed with the Securities and Exchange Commission are audited by its independent certified public accountants, Coopers and Lybrand. Thus, the defendant Commissioner of Insurance will have every opportunity to monitor the progress of plaintiff Motor Club of America Insurance Company in its continued operation. If any unforeseen developments occur, defendant Commissioner has the authority to apply to this very same Court for relief.

Affidavit of David Green (November 12, 1980)

18. The filing of delinquency proceedings against plaintiff, which is imminently threatened, will irreparably injure the plaintiff in at least the following respects:

a) It will injure the good will and reputation of Motor Club of America Insurance Company, unfairly tainting it with the label of insolvency and all that that implies for its routine business dealings with customers and creditors. Defaults may be declared in credit arrangements; policyholders may be deterred in the voluntary market from purchasing insurance from Motor Club of America Insurance Company; plaintiff's cash flow could be impacted by the presentation of claims on an accelerated basis, and the withholding of the payments of premiums when due. Difficulties will be raised in obtaining reinsurance, and employee and management morale of many persons who have devoted their life's work to the company will be damaged;

b) The risks that Insurance Departments around the country will call upon plaintiff to surrender its certificate of authority as a foreign company in those states will be seriously increased. One of the principal assets of plaintiff, which should be of substantial value to a potential purchaser or merger partner, is its nationwide licensing system developed over many years. The efforts of Motor Club of America Insurance Company actually to transact insurance business in other states, which it diligently pursued, has in recent times been seriously deterred by the negative operating results and financial condition which has resulted from the impact upon it of the defendants' insurance regulatory system. Massachusetts, Connecticut and Florida already have re-

quested and obtained our withdrawal from transacting insurance business in their respective states.

c) Most important, it threatens to deliver the actual possession of the assets and business of Motor Club of America Insurance Company to the defendant Commissioner whose policies and decisions in recent years have converted plaintiff from a profitable enterprise to a losing venture. Such a surrender of possession would not have been as objectionable if it had occurred at an earlier time, before plaintiff's surplus had been so badly eroded to its present low level, or if there was an assurance of compensation for the assets to be taken and the injury previously caused. But in the present circumstances such a taking without the assurance of compensation will result in disaster to plaintiff, with a material risk that our assets and business will be transferred to a third party at bargain basement rates. Plaintiff can still be a viable company with adequate regulatory relief, but not otherwise; and delinquency proceedings will not produce that relief. What plaintiff requires now is persons in its control with the determination to seek such relief and to restore its financial substance in the prosecution of its inverse condemnation claim. It is apparent to me that the defendant Commissioner is not in a position to assume such a role. The commencement of delinquency proceedings threatens to place defendant Commissioner in an untenable position faced with profound conflicts of position, thereby depriving the plaintiff of both the leadership and resources required to wage the battle which must be fought if

plaintiff is to remain viable and to receive the recoveries to which it is entitled under the State and Federal Constitution.

DAVID GREEN

Sworn and subscribed to
before me this 7th day
of November, 1980.

JEAN A. HEINZE
Notary Public of New Jersey
My Commission Expires April 3, 1985

Order of the Appellate Division in *Automobile Insurance Plans Service Office* v. *James J. Sheeran*, No. A-1024-77 (April 25, 1978)

(Filed—April 25, 1978)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-1024-77

Motion No. M-2638-77

Before Part C

Judges: Fritz, Botter and Ard

AUTOMOBILE INSURANCE PLANS SERVICE OFFICE, ETC.

vs.

JAMES J. SHEERAN, ETC.

Moving Papers Filed: April 4, 1978

Answering Papers Filed: April 17, 1978

Date Submitted to Court: April 19, 1978

Date Decided: April 24, 1978

This matter having been duly presented to the Court, it is hereby ordered as follows:

Order of the Appellate Division in Automobile Insurance Plans Service Office v. James J. Sheeran, No. A-1024-77 (April 25, 1978)

Cross motion to dismiss appeal or for a remand to supplement the record—Granted.

Supplemental:

Appellant's purported appeal is from an administrative approval of appellant's submission. The relief sought by appellant in the agency was granted, not denied. The appeal from this action obviously seeks a declaratory judgment concerning much more. Since there is no pending justiciable controversy, the appeal is dismissed.

For the Court:

JOHN W. FRITZ, P.J.A.D.

Witness, the Honorable John W. Fritz, Presiding Judge of Part C, Superior Court of New Jersey, Appellate Division, this 24th day of April 1978.

ELIZABETH MCLAUGHLIN
Clerk of the Appellate Division

Affidavit of Robert J. Schraeder (November 12, 1980)

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION—MERCER COUNTY
Docket No. C-702-80E
Civil Action

MOTOR CLUB OF AMERICA INSURANCE COMPANY, a corporation of the State of New Jersey,

Plaintiff,

vs.

STATE OF NEW JERSEY, STATE OF NEW JERSEY DEPARTMENT OF INSURANCE and JAMES J. SHEERAN, NEW JERSEY COMMISSIONER OF INSURANCE,

Defendants.

STATE OF NEW JERSEY, }
COUNTY OF HUNTERDON, } ss.:

ROBERT J. SCHRAEDER, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am Vice President of A. M. Best Co., Inc., Ambest Road, Oldwick, New Jersey.

2. Since 1899, A. M. Best Co., Inc. has been preparing studies and publishing information regarding the

financial position, history and transactions of insurance companies and branch offices of foreign companies operating in the United States and Canada, writing fire, marine, casualty, accident and health, surety and allied classes of business. On companies licensed to do business in the United States, Best's Policyholders' Ratings or Best's General Ratings are presented, indicating our opinion of the comparative position of each company or association, measured by industry averages.

3. Attached as Appendix A is Introduction to the Best's Insurance Reports—Property-Casualty of 1980, which explains the Best's Ratings.

4. The reports on Motor Club of America Insurance Company which appeared in the Best's Insurance Reports—Property-Casualty for the years 1970 through 1979, respectively, show the Rating of Motor Club of America Insurance Company as A+ (Excellent) for the years 1970 through 1974, B+ (Very Good) in 1975, B (Good) in 1976 through 1978 and C (Fair) in 1979.

5. Attached as Appendix B is copy of Best's Insurance Management Reports—Property-Casualty Release No. 9, dated August 4, 1980, which was prepared in the ordinary course of business of A. M. Best Co., Inc.

6. Also in the ordinary course of its business operations, A. M. Best Co., Inc. has analyzed the automobile insurance experience of the 15 leading New Jersey insurers. The results of that study are attached as Appendix C. In 1979, New Jersey automobile insurers paid out $201 million more in automobile acci-

dent claims and expenses than were collected in premiums. This loss from underwriting was offset by investment income and realized gains of $63,200,000, resulting in a $137,800,000 loss from writing New Jersey automobile insurance. This $137,800,000 loss in 1979 compares with the following losses in previous years:

$109,900,000 in 1978
63,300,000 in 1977
145,500,000 in 1976
168,600,000 in 1975;

a total of $625,100,000 in New Jersey automobile insurance losses for the five year period 1975-1979.

7. I am aware of the fact that prior to the mid-1970's and the introduction of New Jersey laws and regulations regarding No Fault Reform, premium rate levels, nonrenewal laws and regulations, compulsory automobile and motor vehicle insurance and the sharp increase in the numbers of insureds in the New Jersey Automobile Insurance Plan, that companies writing automobile insurance in New Jersey generally reported positive net income on their automobile insurance lines.

ROBERT J. SCHRAEDER

Sworn and subscribed to
before me this 7th day
of November, 1980

GEORGE G. HILL
Notary Public of New Jersey
My Commission Expires September 24, 1983

Appendix A to Schraeder Affidavit

Introduction

In this volume we present comprehensive reports upon the financial position, history and transactions of over seventeen hundred insurance companies and branch offices of foreign companies operating in the United States and Canada, writing fire, marine, casualty, accident and health, surety and allied classes of business. On companies licensed to do business in the United States, we present Best's Policyholders' Ratings or Best's General Ratings indicating our opinion of the comparative position of each company or association, measured by industry averages. We believe that this volume, together with our complete, carefully edited monthly magazine (*Best's Review, Property-Casualty Insurance Edition*), *Best's Insurance Management Reports*, and our special reporting service, places at the disposal of all interested—in or out of the insurance business—the most up-to-date, complete, reliable and valuable information about underwriting companies or organizations.

The reports presented herein upon the respective stock, mutual, Lloyds and reciprocal insurance institutions are based upon their sworn annual statements, required to be filed with the various states, and in many instances supplementary data, accurate analysis of which requires special knowledge and experience.

The separate report on each institution listed in this volume includes a review of History—Management—General Underwriting Policy—Investment Policy—and a variety of statistical exhibits: Underwriting by Classes—Classification of Admitted Assets—Comparative Financial, Underwriting and Investment figures and Distribution by States

of Premium Income. Also presented are comparative statistics covering assets and liabilities, the distribution of premiums and losses, direct and net, under different types of risks, as well as a wide variety of other important data.

There is also supplied for quick reference 1: a list of all mutual insurance companies, large and small, whose titles and addresses we have been able to secure (approximately 2,000 in number) grouped by states of incorporation, showing (a) the year began business, (b) total assets, (c) premiums and/or assessments received, (d) net losses paid; 2: general history and comparative financial and operating statistics of companies transacting property and casualty insurance in Canada; 3: general review, plan of operation and financial statements of all State Workers Compensation Insurance Funds in the United States; 4: listing of Underwriting Organizations and Combination Policies; 5: listing of companies and associations which have retired in the last ten years.

Best's Policyholders' Ratings—Best's General Ratings

In very few other forms of busines activity is financial responsibility more vital than in the insurance business. It follows that the utmost care must be exercised in the selection of insurance carriers.

Best's Policyholders' Ratings or Best's General Ratings are based upon analysis which give consideration to each of a number of factors of varying importance which in the operation of an insurance institution result in permanence and safety for its policy or bond holders, or the reverse. The adequacy of the net safety factor (capital and surplus in a stock company and surplus in a mutual or reciprocal institution, assets taken at market values and credit allowed

for equities, if any, in reserves), the adequacy of the reserves set up to provide for the ultimate payment of undischarged liabilities; the profit or loss from underwriting, the economy of operation and skill in selection of risks assumed, reflected by the ratios of expenses and losses to premiums; the size and spread of underwriting commitments, gross and net; the soundness, liquidity, diversification and yield of assets, with adequate attention to the relation of real estate or large single investments, if any, to total resources; the general trend of the business and other factors, are all weighed in arriving at the final Best's Policyholders' Rating or Best's General Rating.

So much interest in Best's Policyholders' Rating or Best's General Rating systems has been manifested by our clients —including mercantile and manufacturing concerns, public utility companies and others purchasing large amounts of insurance, banks and trust companies, insurance agents, brokers and insurance companies—that an explanation of some of the factors used is presented in a review which appears in the "Preface" of this publication.

Historial Development of This Volume

Our first volume, published in 1900, contained three hundred pages as compared with the present two thousand-page book. The six-fold growth is due to an increase in the number of insurance organizations in active operation and to the enlargement of the scope of each report. When the first volume was issued the casualty-surety business was in its infancy. Until 1914 a single volume of reports covered all the classes of carriers above mentioned. In that year, however, because many subscribers were interested only in either fire and marine lines or casualty or surety lines, we divided the book into two separate volumes.

Appendix A to Schraeder Affidavit

Multiple line underwriting operations are now widespread. One company, if financially strong enough, is permitted in all States to write all the enumerated classes of business, in contrast to earlier years, when fire and marine companies were prohibited from writing casualty and surety business, and vice versa. This change necessitated consolidating the two volumes in one over-all publication in 1952. The current volume may, therefore, properly be considered the eighty-first consecutive annual edition.

We have spared no effort to serve those who need full information and shall appreciate suggestions looking toward further improvement, in even the smallest detail.

We extend to our subscribers our thanks for their support.

A. M. BEST COMPANY, INC.
Oldwick, New Jersey, May 1980

Appendix B to Schraeder Affidavit

(Opposite) ☛

BEST'S INSURANCE MANAGEMENT REPORTS

Property/Casualty
Release No. 9
August 4, 1980

A.M. Best Company
Oldwick, N.J. 08858
201-439-2200

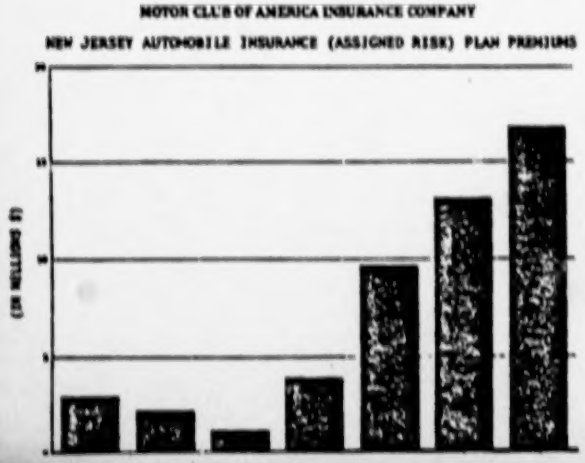
Financial News | Washington Review | Statistical Studies | Perspectives

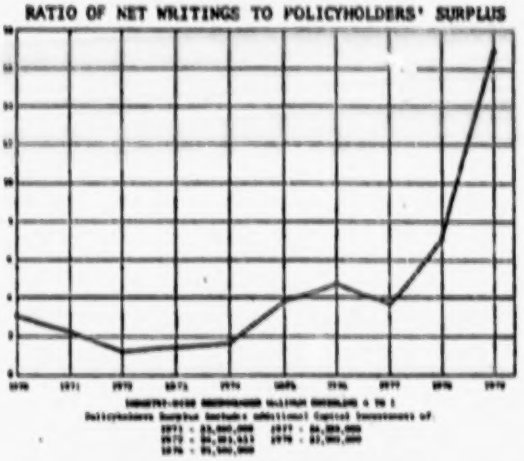
Preliminary "Special Report" on New Jersey Auto Insurer Is Due Next Week

Next week, Kramer Capital Consultants is scheduled to present its preliminary report on the condition of Motor Club of America Insurance Company to New Jersey insurance commissioner James J. Sheeran. The report, which will describe the findings of a "special audit," is being conducted at the request of the commissioner but at the expense of the insurer and is supposed to determine how much "extraordinary relief" the commissioner should grant MCA. The company is requesting an auto insurance rate increase of 31.7%, permission to non-renew its assigned risk customers, a continuation of its moratorium on acceptance of new assigned risks, and permission to refuse to renew certain of its voluntary business. This special review by Kramer was ordered by the commissioner despite the presence of department examiners at MCA since October 1979.

A special audit isn't needed to show that the situation at MCA is serious. The company offers a microcosmic look at the auto insurance situation in New Jersey as it has unfolded under the administration of Mr. Sheeran. MCA's plight is worse than that of other companies only because its business is about 80% in New Jersey's auto insurance market. Lacking sufficient geographic and coverage spread, it has no cushion with which to withstand the crushing combination of a bad no-fault law and a regulatory philosophy that espouses consumerism above all.

Despite the pullout of a number of companies from New Jersey and the glaring need for an adequate rate and reform of





the no-fault law, Commissioner Sheeran has evinced little concern for the plight of the automobile insurers in his jurisdiction. The rationale appears to be that underwriting profits from other lines and other states can carry the New Jersey burden. Legislative, regulatory and pricing constraints are such that virtually no new voluntary auto policies are written in the New Jersey market. New drivers, with rare and ever-decreasing exception, go directly into the New Jersey Automobile Insurance Plan, so that, at this point, some 40% of the insured drivers in the state are assigned risks.

The state has a compulsory no-fault law that has been termed the worst in the country – it contains an extremely low ($200) tort threshold coupled with an unlimited medical provision, so that suits abound and catastrophic losses have become considerably more numerous. At the same time, thanks to recent legislation, assigned risk policies provide liability coverage up to a $100,000/$300,000 limit, an amount that assures assigned losses will be "too big to eat." Overseeing this conglomeration of laws and rules that almost seem designed to produce an underwriting loss is an insurance commissioner who has steadfastly refused to approve rates commensurate with the coverages provided. In the case of the Motor Club, with auto insurance as the primary business and with 40% of that business coming in as assigned risks, the consequences have been disastrous.

Since 1971 the management of MCA Insurance Co. has found it necessary and has been a[illegible] to add nearly $18 million

to the company's capital and surplus; but all of that money, plus investment gains, plus income tax recoveries arising out of underwriting losses, has been lost in the auto market – and on top of that, policyholders' surplus has been drained during the period from just under $7 million at the start of 1971 to $3.2 million at the close of 1979.

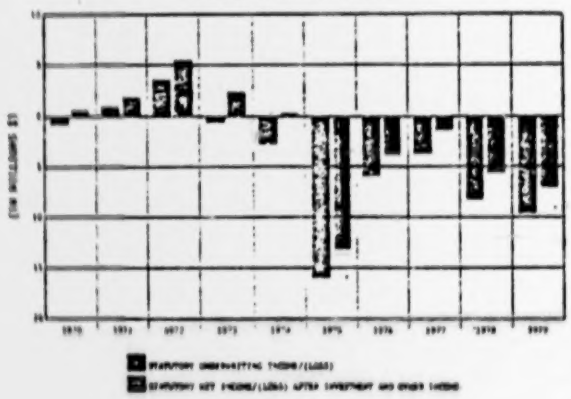
MCA's current premiums written-to-surplus ratio is 17 to1, a figure that would boggle most minds – but not that of Mr. Sheeran, who when told by MCA that Connecticut was about to order the company to withdraw from that state because writings to surplus were so far out of line, responded that such ratios "don't mean a damn thing to me." MCA solved its Connecticut difficulty by putting up an escrow account and it is running off that business.

Considering the circumstances prevailing in New Jersey, infusion of more money into MCA Insurance would be a highly questionable, if not reckless, action. In the absence of rate or underwriting concessions, a buy-out of the holding company's auto club and other assets and discontinuance and run-off of the insurance operation seem to be the only ways to avoid a major insurance company insolvency.

Commissioner Sheeran was quoted in a Newark newspaper as admitting that MCA's failure "would have a material impact on my ability to maintain orderly markets in the automobile insurance lines." He has proclaimed the special audit by Kramer to be a "rescue mission" for MCA. Unlike GEICO,

MOTOR CLUB OF AMERICA INSURANCE COMPANY

RESULTS OF OPERATIONS



Nationwide, SAFECO and others that have done so, MCA has no option to withdraw from the state.

It is difficult to see how the interests of the public, the industry or the State of New Jersey could be served if MCA is put into rehabilitation. While the loss of the company could prompt rate and regulatory reform, it would be at the expense of throwing more than 100,000 drivers onto a contracting market and raising questions about the adequacy of state insurance regulation.

©Copyright 1980 by
A. M. Best Company, Inc., Oldwick, New Jersey 08858

Appendix C to Schraeder Affidavit

1979 Auto Insurance Experience

of the

15 Leading New Jersey Insurers

Company/Group	Private Passenger Auto Direct Premiums Earned	Private Passenger Auto Combined Ratio*
Allstate	$265,788,000	111.8%
State Farm	121,313,000	102.8
New Jersey Manufacturers	102,533,000	114.6
Liberty Mutual	69,162,000	121.3
Selected Risks	44,578,000	117.8
Prudential	44,116,000	121.6
Travelers	41,650,000	105.8
Aetna Life & Casualty	40,920,000	126.8
Motor Club of America	40,815,000	120.8
Continental	34,159,000	115.4
INA	32,025,000	125.0
Fireman's Fund	27,072,000	136.9
General Accident	26,780,000	121.1
Ohio Casualty	25,857,000	104.2
Royal Insurance	25,305,000	119.0

Source: A.M. Best Company, Inc., Oldwick, New Jersey
Reprinted with Permission

---

* Combined ratio is the sum of the ratio of losses incurred to premiums earned and the ratio of commissions and expenses incurred to premiums written. Anything over 100.0% represents a loss.

Statutory Material, Regulations, and Court Rules

New Jersey Statutes

N.J.S.A. 2A:14-1

2A:14-1. *6 years*

Every action at law for trespass to real property, for any tortious injury to real or personal property, for taking, detaining, or converting personal property, for replevin of goods or chattels, for any tortious injury to the rights of another not stated in sections 2A:14-2 and 2A:14-3 of this Title, or for recovery upon a contractual claim or liability, express or implied, not under seal, or upon an account other than one which concerns the trade or merchandise between merchant and merchant, their factors, agents and servants, shall be commenced within 6 years next after the cause of any such action shall have accrued.

This section shall not apply to any action for breach of any contract for sale governed by section 12A:2-725 of the New Jersey Statutes.

N.J.S.A. 17:29A-1(f)

(f) "Rating organization" means every person or persons, corporation, partnership, company, society, or association engaged in the business of rate-making for two or more insurers.

N.J.S.A. 17:29A-2

17:29A-2. *License required; application; fee*

No rating organization shall do business in this State until it shall have been licensed to do so by the commissioner. Application for such license shall be made on such forms as the commissioner shall prepare for that purpose. Upon applying for such license, every rating organization shall file with the commissioner (1) a copy of its constitution, its articles of agreement or association, or its certificate of incorporation, and of its by-laws or rules governing the conduct of its business, or such of the foregoing, if any, as such rating organization may have; (2) a list of insurers who are or who have agreed to become members of or subscribers to such rating organization; (3) the name and address of a person or persons in this State upon whom notices, or orders of the commissioner affecting such rating organization may be served; and (4) such other information as the commissioner may require. If the commissioner finds that the applicant for license (a) has complied with the provisions of this act; (b) is equipped with an adequate staff of experts and clerks qualified in rate-making; and (c) is otherwise qualified to function as a rating organization, he shall issue a license to such rating organization authorizing it to engage in rate-making for the kinds of insurance specified in such license. If the commissioner shall determine that the applicant is not entitled to a license, he shall make an order denying its application, specifying his reasons for such denial. Licenses issued pursuant to this section shall remain in effect until suspended in the manner provided by this act. Every rating organization doing

business in this State on the effective date of this act, may continue to transact such business thereafter, subject to the provisions of this act, pending its application to the commissioner, to be made within thirty days after the effective date of this act, for a license to do business as required by this section. A fee of twenty-five dollars ($25.00) shall be paid for each license issued under this section.

N.J.S.A. 17:29A-3

17:29A-3. *Insurers may be members of rating organizations*

Every rating organization shall make reasonable provision in its bylaws, rules, constitution, or otherwise, to permit any insurer engaged in the kind of insurance for which rate-making is done by such rating organization, to become a member thereof, or a subscriber for any kind of insurance or subdivision of a kind of insurance found by the commissioner to be a proper basis for service by the rating organization upon application therefor by such insurer. No insurer shall be a member of or a subscriber to more than one rating organization for the purpose of making rates for the same kind or for the same subdivision of a kind of insurance. No rating organization shall discriminate unfairly between insurers in the condition imposed for admission as subscribers, or in the services rendered to either members or subscribers. The refusal of any rating organization to admit an insurer as a subscriber shall, at the request of such insurer, be reviewed by the commissioner at a hearing held upon at least 10 days' notice to such rating organization and such insurer. If the commissioner shall

find that the insurer has been refused admittance to such rating organization as a subscriber without justification, he shall make an order directing such rating organization to admit such insurer as a subscriber. If he shall find that the action of the rating organization in refusing admittance to an insurer as a subscriber is justified, he shall make an order affirming its action.

N.J.S.A. 17:29A-6

17:29A-6. *Rating system to be filed*

Beginning with the sixtieth day after this act takes effect, every insurer shall, before using or applying any rate to any kind of insurance, file with the commissioner a copy of the rating-system upon which such rate is based, or by which such rate is fixed or determined. The filing herein required may, on written notice by an insurer to the commissioner, be made on behalf of such insurer, by a rating organization of which such insurer is a member or subscriber. The provisions of this section shall be deemed to have been complied with by any insurer which had, before the effective date of this act, directly or by a rating organization of which it is a member or subscriber, or by a designated agent or expert, filed with the commissioner a rating-system substantially in the form required by this section to be filed. From and after the date of the filing of such rating-systems, every insurer shall charge and receive rates fixed or determined in strict conformity therewith, except as in this act otherwise expressly provided.

N.J.S.A. 17:29A-7

17:29A-7. *Rating system, approval of; revision or modification*

If, after examination thereof, the commissioner shall find that such rating-systems filed by or on behalf of an insurer provide for, result in, or produce rates that are unreasonably high or excessive, or are not adequate for the safeness and soundness of the insurer, or are unfairly discriminatory between risks in this State involving essentially the same hazards and expense elements, he shall issue an order to such insurer, or to the rating organization of which such insurer is a member or subscriber, directing that such rating-systems be altered in the manner and to the extent stated in such order, to produce rates that are reasonable and adequate, and not unfairly discriminatory. If the commissioner shall find that such rating-systems provide for, result in, or produce rates that are not unreasonably high, and are not inadequate for the safeness and soundness of the insurer, and are not unfairly discriminatory between risks in this State involving essentially the same hazards and expense elements, he shall approve such rates, and such approval shall continue in effect until the commissioner shall, by order, direct that such rating-systems be changed or modified, as in this section provided. If the commissioner shall fail to approve or disapprove any rating-systems within ninety days from the filing thereof such rating-systems shall be deemed to be approved by him. Whenever the commissioner shall find that rating-systems theretofore approved by him provide for, result in, or produce rates which are unreasonable, or inadequate, or which discriminate unfairly between risks in this State involving essentially the same hazards

and expense elements, he shall issue an order to all insurers employing such rating-systems, or to the rating organizations of which such insurers are members or subscribers, directing that such rating-systems be altered or revised in the manner and to the extent stated in such order to provide for, result in, or produce rates which are reasonable, adequate, and do not discriminate unfairly between risks in this State involving essentially the same hazards and expense elements. Rating-systems filed with the commissioner on or before the effective date of this act pursuant to the provisions of this section, shall be deemed to have been approved by the commissioner, such approval to continue in effect until the commissioner shall, by order, direct that such rating-system be altered or modified as in this section provided.

N.J.S.A. 17:29A-14

17:29A-14. *Alteration of rating systems; copies to be filed; approval of commissioner*

A rating organization, or any insurer making its own rates, may, from time to time, alter, supplement, or amend its rating systems, or any part thereof, by filing with the commissioner copies of such alterations, supplements, or amendments together with a statement of the reason or reasons for such alteration, supplement, or amendment. If such alteration, supplement or amendment shall have the effect of increasing or decreasing rates, the commissioner shall determine whether the rates as altered thereby are reasonable, adequate, and not unfairly discriminatory. If the commissioner shall determine that the rates as so altered are not unreasonably high, or inadequate, or unfairly discriminatory, he shall make an order approving

them. If he shall find that the rates as altered are unreasonable, inadequate, or unfairly discriminatory, he shall issue an order disapproving such alteration, supplement or amendment.

N.J.S.A. 17:29A-24

17:29A-24. *Review; stay*

Any order made by the commissioner pursuant to the provisions of this act shall be subject to review by the Superior Court in a proceeding in lieu of prerogative writ. Upon the institution of the proceeding, the court may, in the following cases, stay the provisions of such order:

(a) Where, pursuant to section two of this act, a rating organization, which was engaged in the business of rate-making on the effective date of this act, has been refused a license by the commissioner. Such rating organization may, with leave of court, be allowed to continue to engage in business, subject to the provisions of this act, pending final disposition of its application for review; or

(b) Where any order of the commissioner shall provide for a change in any rating-system which results in an increase or decrease in rates, any insurer affected thereby may, with leave of court, pending final disposition of the proceedings in the Superior Court, continue to charge rates which obtained prior to such order, on condition that the difference in the rates be deposited in a special account by the insurer affected, to be held in trust by such insurer, and to be retained by the insurer or paid to the holders of policies issued after the order of the commissioner, as the court may determine.

N.J.S.A. 17:29D-1

17:29D-1. *Rules and regulations*

The Commissioner of Insurance may adopt, issue and promulgate rules and regulations establishing a plan for the providing and apportionment of insurance coverage for applicants therefor who are in good faith entitled to, but are unable to procure the same, through ordinary methods. Every insurer admitted to transact and transacting any line, or lines, of insurance in the State of New Jersey shall participate in such plan and provide insurance coverage to the extent required in such rules and regulations.

Prior to the adoption or amendment of such rules and regulations, the commissioner shall consult with such members of the insurance industry as he deems appropriate. Such consultation shall be in addition to any otherwise required public hearing or notice with regard to the adoption or amendment of rules and regulations.

N.J.S.A. 17:30-8

17:30-8. *Procedure*

When in the judgment of the board of directors of an insurance corporation of this state, it is deemed advisable and most for the benefit of the company that it be dissolved, the board, by a majority vote of all its members at a meeting called for that purpose, of which meeting each director shall have received at least three days' notice, shall pass a resolution to that effect and call a meeting of the stockholders to take action thereon. Within ten days after the adoption of the resolution, notice of its adoption and of the calling of the meeting to take action there-

on, shall be mailed to each stockholder, or, if a mutual company, to each member residing in the United States, and a like notice shall be published in a newspaper published in the county wherein the company has its principal office, beginning within such ten days and continuing for at least four weeks successively, once a week, next preceding the time appointed for the meeting. The meeting shall be held at the company's office between the hours of ten o'clock in the forenoon and three o'clock in the afternoon on the day so named, and may, by consent of a majority in interest of the stockholders or members present, be adjourned from time to time, for not less than eight days at any one time. Notice of an adjourned meeting shall be given by advertisement in such newspaper.

If at the meeting, two-thirds in interest of all the stockholders, or, if a mutual company, two-thirds of the members, consent that a dissolution take place and signify their consent in writing, the consent, together with a list of the names and residences of the directors and officers, certified by the president and the secretary or treasurer, shall be filed in the department. Thereupon the commissioner, if satisfied by proof, submitted to and verified by him, that the requirements aforesaid have been complied with, shall issue a certificate that the consent has been filed. The board of directors shall cause the certificate to be published, four weeks successively, at least once a week, in a newspaper published in the county. Upon filing in the department an affidavit that the certificate has been so published, the company shall be dissolved and the board shall proceed to settle up and adjust its business and affairs. It may sell, exchange or invest in bonds of the home owners' loan corporation or other agencies of the federal government, for cash, securities or other instruments held by them as such trustees.

When all the stockholders or members consent, in writing, to a dissolution, no meeting or notice thereof shall be necessary, but on filing the consent in the department, the commissioner shall forthwith issue a certificate of dissolution, which shall be published as above provided.

No disbursement of the assets or funds of the company shall be made to the stockholders until all proceedings in the voluntary dissolution have been first approved by the commissioner.

Laws of 1975, Ch. 113, §31

Repealer.

31. Repealer. Chapter 30 of Title 17 of the Revised Statutes is repealed but such repeal shall not affect pending proceedings under such sections.

N.J.S.A. 17:30C-1 through 17:30C-31

17:30C-1. *Definitions*

a. "Impairment or insolvency" means the capital of a stock insurer or the surplus of a mutual insurer, shall be deemed to be impaired and the insurer shall be deemed to be insolvent, when such insurer is not possessed of assets at least equal to all liabilities and required reserves together with its total issued and outstanding capital stock of a stock insurer, or the minimum surplus if a mutual insurer required by this title to be maintained for the kind or kinds of insurance it is then authorized to transact.

b. "Insurer" shall include a person subject to the insurance supervisory authority of, or to liquidation, rehabilitation, reorganization or conservation by, the commissioner

or the equivalent insurance supervisory official of another state; also all persons purporting to be engaged as insurer in this State, and persons in process of organization to become insurers, pursuant to the provisions of Title 17 of the Revised Statutes.

c. "Delinquency proceeding" means any proceeding commenced against an insurer pursuant to this act for the purpose of liquidating, rehabilitating, reorganizing or conserving such insurer.

d. "Domiciliary state" means the state in which an insurer has its domicile, or in the case of an alien insurer the State in which such insurer, having become authorized to do business in such state, has at the commencement of delinquency proceedings, the largest amount of its assets held in trust and assets held on deposit for the benefit of its policyholders or policyholders and creditors in the United States, and any such insurer is deemed to be domiciled in such state.

e. "Ancillary state" means any state other than a domiciliary state.

f. "Reciprocal state" means any state other than this State in which in substance and effect the provisions of the Uniform Insurers Liquidation Act, as defined in section 23 of this act are in force, including the provisions requiring that the commissioner or equivalent insurance supervisory official be the receiver of a delinquent insurer.

g. "General assets" means all property, real, personal or otherwise, not specifically mortgaged, pledged, deposited or otherwise encumbered for the security or benefit of specified persons or a limited class or classes of persons, and as to such specifically encumbered property the term in-

cludes all such property or its proceeds in excess of the amount necessary to discharge the sum or sums secured thereby. Assets held in trust and assets held on deposit for the security or benefit of all policyholders or all policyholders and creditors in the United States shall be deemed general assets.

h. "Preferred claim" means any claim with respect to which the law of the State or of the United States accords priority of payment from the general assets of the insurer.

i. "Special deposit claim" means any claim secured by a deposit made pursuant to statute for the security or benefit of a limited class or classes of persons, but not including any general assets.

j. "Secured claim" means any claim secured by mortgage, trust, deed, pledge, deposit as security, escrow or otherwise, but not including special deposit claim or claims against general assets. The term also includes claims which more than 4 months prior to the commencement of delinquency proceedings in the state of the insurer's domicile have become liens upon specific assets by reason of judicial process.

k. "Receiver" means receiver, liquidator, rehabilitator or conservator as the context may require.

17:30C-2. *Jurisdiction of delinquency proceedings*

The Superior Court shall have original jurisdiction of delinquency proceedings under this act.

17:30C-3. *Exclusive remedy—appeal*

Delinquency proceedings pursuant to this act shall constitute the sole and exclusive method of liquidating, rehabilitating, reorganizing or conserving an insurer, and no court shall entertain a petition for the commencement of such proceedings, or any other similar procedure, unless the same has been instituted by the commissioner.

17:30C-4. *Commencement of delinquency proceeding*

a. The commissioner shall commence any such proceeding by an application to the court or to any judge thereof, for an order directing the insurer to show cause why the commissioner should not have the relief prayed for.

b. The application shall be by verified petition, setting forth the ground or grounds for the proceeding and the relief demanded.

c. If the court is satisfied from reading the commissioner's petition that the facts therein alleged, if established, would constitute grounds for a delinquency proceeding under this act, it shall issue an order to show cause as referred to in a. above.

d. On the return of the order to show cause, the court shall either deny the application or grant the application together with such other relief as the nature of the case and the interests of the policyholders, creditors, stockholders, members, subscribers or the public may require.

17:30C-5. *Injunction*

a. Upon application by the commissioner for such an order to show cause, or at any time thereafter, the court may, without notice, issue an injunction restraining the insurer, its officers, directors, stockholders, policyholders, agents, and all other persons from the transaction of its business or the waste or disposition of its property until the further order of the court.

b. The court may, at any time during a proceeding under this act, issue such other injunctions or orders as may be deemed necessary to prevent interference with the commissioner or the proceeding, or waste of the assets of the insurer, or the commencement or prosecution of any actions, or the obtaining of preferences, judgments, attachments or other liens, or the making of any levy against the insurer or against its assets or any part thereof.

17:30C-6. *Grounds for rehabilitation—domestic insurers*

The commissioner may apply to the court for an order directing him to rehabilitate a domestic insurer upon one or more of the following grounds: That the insurer

a. Is impaired or insolvent; or

b. Has refused to submit its books, records, accounts or affairs to the reasonable examination of the commissioner; or

c. Has concealed or removed records or assets in violation of regulations which the commissioner may adopt; or

d. Has failed to comply with the commissioner's order, made pursuant to law, to make good an impairment of capital (if a stock insurer) or an impairment of surplus (if a mutual insurer) within the time prescribed by law; or

e. Has transferred or attempted to transfer substantially its entire property or business, or has entered into any transaction the effect of which is to merge substantially its entire property or business in that of any other insurer without first having obtained the written approval of the commissioner; or

f. Is found, after examination, to be in such condition that its further transaction of business will be hazardous to its policyholders, or to its stockholders, or to its creditors, or to the public; or

g. Has willfully violated its charter or any law of this State; or

h. Has an officer, director, or manager who has unlawfully refused to be examined under oath, concerning its affairs; or

i. Has failed or refused to take such steps as may be necessary to remove from office any officer or director whom the commissioner has found, after notice to and hearing of such insurance company and of such officer or director, to be a dishonest or untrustworthy person; or

j. Has been the subject of an application for the appointment of a receiver, trustee, custodian or sequestrator of the insurer or of its property, otherwise than pursuant to the provisions of this act but only if such appointment has been made or is imminent; or

k. Has consented to such an order through a majority of its directors, stockholders, or policyholders; or

l. Has failed to pay a final judgment rendered against it in any state upon any insurance contract issued or assumed by it, within 30 days after the judgment became final or within 30 days after time for taking an

appeal has expired, or within 30 days after dismissal of an appeal before final determination, whichever date is the later.

17:30C-7. *Nature of rehabilitation order—termination of rehabilitation—domestic insurers*

a. An order to rehabilitate a domestic insurer shall direct the commissioner forthwith to take possession of the property of the insurer and to conduct the business thereof, and to take such steps toward removal of the causes and conditions which have made rehabilitation necessary, as the court may direct.

b. If at any time the commissioner deems that further efforts to rehabilitate the insurer would be useless, he may apply to the court for an order of liquidation.

c. The commissioner, or any interested person upon due notice to the commissioner, at any time may apply for an order terminating the rehabilitation proceeding and permitting the insurer to resume possession of its property and the conduct of its business.

17:30C-8. *Grounds for liquidation*

The commissioner may apply to the court for an order directing him to liquidate the business of a domestic insurer or of the United States branch of an alien insurer having trusteed assets in this State, regardless of whether or not there has been prior order directing him to rehabilitate such insurer, upon any of the grounds specified in section 6,[1] or upon any one or more of the following grounds: That the insurer

a. Has ceased transacting business for a period of 1 year; or

b. Is an insolvent insurer and has commenced voluntary liquidation or dissolution, or attempts to commence or prosecute any action or proceeding to liquidate its business or affairs, or to dissolve its corporate charter, or to procure the appointment of a receiver, trustee, custodian, or sequestrator under any laws except this act; or

c. Has not organized or completed its organization and obtained a certificate of authority as an insurer.

17:30C-9. *Order of liquidation—domestic insurers*

a. An order to liquidate the business of a domestic insurer shall direct the commissioner forthwith to take possession of the property of the insurer, to liquidate its business, to deal with the insurer's property and business in his own name as commissioner or in the name of the insurer as the court may direct and to give notice to all creditors who may have claims against the insurer to present such claims.

b. The commissioner may apply under this act for an order dissolving the corporate existence of a domestic insurer:

(1) Upon his application for an order of liquidation of such insurer, or at any time after such order has been granted; or

(2) Upon the grounds specified in section 8 c., regardless of whether an order of liquidation is sought or has been obtained.

17:30C-10. *Order of liquidation—alien insurers*

An order to liquidate the business of a United States branch of an alien insurer having trusteed assets in this State shall be in the same terms as those prescribed for domestic insurers, save and except only that the assets of the business of such United States branch shall be the only assets included therein.

17:30C-11. *Grounds for conservation—foreign insurers*

The commissioner may apply for an order directing him to conserve the assets within this State of a foreign insurer upon any one or more of the following grounds:

a. Upon any of the grounds specified in section 6,[1] and in section 8b.[2]

b. That its property has been sequestrated in its domiciliary sovereignty or in any other sovereignty.

17:30C-12. *Grounds for conservation—alien insurers*

The commissioner may apply for an order directing him to conserve the assets within this State of an alien insurer upon any one or more of the following grounds:

a. Upon any of the grounds specified in section 6 [1] and in section 8b.[2]

b. Upon the ground that the insurer has failed to comply within the time designated by the commissioner, with an order made by him to make good an impairment of its trusteed funds, or

c. Upon the ground that the property of the insurer has been sequestrated in its domiciliary sovereignty or elsewhere.

17:30C-13. *Conservation or ancillary receivership—foreign insurers*

a. An order to conserve the assets of a foreign insurer shall direct the commissioner forthwith to take possession of the property of the insurer within this State and to conserve it, subject to the further direction of the court.

b. Whenever a domiciliary receiver is appointed for any such insurer in its domiciliary state the court shall, on application of the commissioner, appoint the commissioner as the ancillary receiver in this State.

c. An order to liquidate the assets in this State of a foreign insurer shall require the commissioner forthwith to take possession of the property of the insurer within this State and to liquidate it subject to the orders of the court and with due regard to the rights and powers of the domiciliary receiver, as provided in this act.

17:30C-14. *Conservation or ancillary receivership—alien insurers*

An order to conserve the assets of an alien insurer shall direct the commissioner forthwith to take possession of the property of the insurer within this State and to conserve it subject to the further direction of the court.

17:30C-15. *Conduct of delinquency proceedings—domestic insurers*

a. Whenever under the laws of this State a receiver is to be appointed in delinquency proceedings for a domestic insurer, the court shall appoint the commissioner as such receiver. The court shall direct the commissioner forthwith to take possession of the assets of the insurer and to administer the same under the orders of the court.

b. As domiciliary receiver, the commissioner shall be vested by operation of law, with the title to all property, contracts, and rights of action, and all of the books and records of the insurer wherever located, as of the date of entry of the order directing him to rehabilitate or liquidate a domestic insurer and he shall have the right to recover the same and reduce the same to his possession.

c. The filing or recording of the order, directing possesion to be taken, or a certified copy thereof, in the office where instruments affecting title to property are required to be filed or recorded, shall impart the same notice as would be imparted by a deed, bill of sale, or other evidence of the title duly filed or recorded.

d. The commissioner, as domiciliary receiver, shall be responsible on his official bond for the proper administration of all assets coming into his possession or control. The court may at any time require an additional bond from him or his deputies, if deemed desirable for the protection of the assets.

e. Upon taking possession of the assets of an insurer, the domiciliary receiver shall, subject to the direction of the court, immediately proceed to conduct the business of the insurer or to take such steps as are authorized by

the laws of this State for the purpose of liquidating, rehabilitating, reorganizing, or conserving the affairs of the insurer.

17:30C-16. *Conduct of delinquency proceedings—foreign and alien insurers*

a. Whenever under this act an ancillary receiver is to be appointed in delinquency proceedings for an insurer not domiciled in this State, the court shall appoint the commissioner as ancillary receiver. The commissioner shall file a petition requesting the appointment on the grounds set forth in section 13 b. of this act:

(1) If he finds that there are sufficient assets of the insurer located in this State to justify the appointment of an ancillary receiver; or

(2) If 10 or more persons resident in this State having claims against such insurer file a petition with the commissioner requesting the appointment of such ancillary receiver.

b. The domiciliary receiver for the purpose of liquidating an insurer domiciled in a reciprocal state shall be vested by operation of law with the title to all of the property, contracts and rights of action, and all of the books and records of the insurer located in this State, and he shall have the immediate right to recover balances due from local agents and to obtain possession of any books and records of the insurer found in this State. He shall also be entitled to recover the other assets of the insurer located in this State, except that upon the appointment of an ancillary receiver in this State, the ancillary receiver shall during the ancillary receivership proceedings have the sole right

to recover such other assets. The ancillary receiver shall, as soon as practicable, liquidate from their respective securities those special deposit claims and secured claims which are proved and allowed in the ancillary proceedings in this State, and shall pay the necessary expenses of the proceedings. All remaining assets he shall promptly transfer to the domiciliary receiver. Subject to the foregoing provisions, the ancillary receiver and his deputies shall have the same powers and be subject to the same duties with respect to the administration of such assets as a receiver of an insurer domiciled in this State.

c. The domiciliary receiver of an insurer domiciled in a reciprocal state may sue in this State to recover any assets of such insurer to which he may be entitled under the laws of this State.

17:30C-17. *Deputies and assistants*

In connection with delinquency proceedings, the commissioner may appoint one or more special deputy commissioners to act for him, and may employ such counsel, clerks, and assistants as he deems necessary. The compensation of the special deputies, counsel, clerks, or assistants, and all expenses of taking possession of the insurer and of conducting the proceedings, shall be fixed by the receiver subject to the approval of the court, and shall be paid out of funds or assets of the insurer. Within the limits of the duties imposed upon them, special deputies shall possess all the powers given to, and, in the exercise of those powers, shall be subject to all of the duties imposed upon the receiver with respect to such proceedings.

17:30C-18. *Claims of nonresidents against domestic insurers*

a. In a delinquency proceeding begun in this State against a domestic insurer, claimants residing in reciprocal states may file claims either with the ancillary receivers, if any, in their respective states or with the domiciliary receiver. All such claims must be filed on or before the last date fixed for the filing of claims in domiciliary delinquency proceedings.

b. Controverted claims belonging to claimants residing in reciprocal states may either:

(1) Be proved in this State, or

(2) If ancillary proceedings have been commenced in such reciprocal states, may be proved in those proceedings. In the event a claimant elects to prove his claim in ancillary proceedings, if notice of the claim and opportunity to appear and be heard is afforded the domiciliary receiver of this State, as provided in section 19 of this act with respect to ancillary proceedings in this State, the final allowance of such claim by the courts in the ancillary state shall be accepted in this State as conclusive as to its amount and shall also be accepted as conclusive as to its priority, if any, against special deposits or other security located within the ancillary state.

17:30C-19. *Claims against foreign insurers*

a. In a delinquency proceeding in a reciprocal state against an insurer domiciled in that state, claimants against such insurer who reside within this State may file claims either with the ancillary receiver, if any, appointed in this State, or with the domiciliary receiver. All such

claims must be filed on or before the last date fixed for the filing of claims in the domiciliary delinquency proceedings:

b. Controverted claims belonging to claimants residing in this State may either:

(1) Be proved in the domiciliary state as provided by the law of that state; or

(2) If ancillary proceedings have been commenced in this State, be proved in those proceedings. In the event that any such claimant elects to prove his claim in this State, he shall file his claim with the ancillary receiver and shall give notice in writing to the receiver in the domiciliary state, either by registered mail or by personal service at least 40 days prior to the date set for hearing. The notice shall contain a concise statement of the amount of the claim, the facts on which the claim is based, and the priorities asserted, if any. If the domiciliary receiver within 30 days after the giving of such notice shall give notice in writing to the ancillary receiver and to the claimant, either by registered mail or by personal service of his intention to contest such claim, he shall be entitled to appear or to be represented in any proceeding in this State involving adjudication of the claim. The final allowance of the claim by the courts of this State shall be accepted as conclusive as to its amount and shall also be accepted as conclusive as to its priority if any, against special deposits or other security located within this State.

17:30C-20. *Form of claim—notice—hearing*

a. All claims against an insurer against which delinquency proceedings have been begun shall set forth in reasonable detail the amount of the claim, or the basis upon which such amount can be ascertained, the facts upon which the claim is based, and the priorities asserted, if any. All such claims shall be verified by the affidavit of the claimant, or someone authorized to act on his behalf and having knowledge of the facts, and shall be supported by such documents as may be material thereto.

b. All claims filed in this State shall be filed with the receiver, whether domiciliary or ancillary, in this State, on or before the last date for filing as specified in this act.

c. Within 10 days of the receipt of any claim, or within such further period as the court may fix, the receiver shall report the claim to the court, specifying in such report his recommendation with respect to the action to be taken thereon. Upon receipt of such report, the court shall fix a time for hearing the claim and shall direct that the claimant or the receiver, as the court shall specify, shall give such notice as the court shall determine to such persons as shall appear to the court to be interested therein. All such notices shall specify the time and place of the hearing and shall concisely state the amount and nature of the claim, the priorities asserted, if any, and the recommendation of the receiver with reference thereto.

d. At the hearing all persons interested shall be entitled to appear and the court shall enter an order allowing in part, or disallowing the claim. Any such order shall be deemed to be an appealable order.

17:30C-21. *Priority of certain claims*

a. In a delinquency proceeding against an insurer domiciled in this State, claims owing to residents of ancillary states shall be preferred claims if like claims are preferred under the laws of this State. All such claims owing to residents or nonresidents shall be given equal priority of payment from general assets regardless of where such assets are located.

b. In a delinquency proceeding against an insurer domiciled in a reciprocal state, claims owing to residents of this State shall be preferred claims if like claims are preferred by the laws of that state.

c. The owners of special deposit claims against an insurer for which a receiver is appointed in this or any other state shall be given priority against their several special deposits in accordance with the provisions of the statutes governing the creation and maintenance of such deposits. If there is a deficiency in any such deposit so that the claims secured thereby are not fully discharged therefrom, the claimants may share in the general assets, but such sharing shall be deferred until general creditors, and also claimants against other special deposits who have received smaller percentages from their respective special deposits, have been paid percentages of their claims equal to the percentage paid from a special deposit.

d. The owner of a secured claim against an insurer for which a receiver has been appointed in this or any other state may surrender his security and file his claim as a general credit, or the claim may be discharged by resort to the security, in which case the deficiency, if any, shall be treated as a claim against the general assets of the insurer on the same basis as claims of unsecured cred-

itors. If the amount of the deficiency has been adjudicated in ancillary proceedings as provided in this act, or if it has been adjudicated by a court of competent jurisdiction in proceedings in which the domiciliary receiver has had notice and opportunity to be heard, such amounts shall be conclusive; otherwise the amount shall be determined in the delinquency proceeding in the domiciliary state.

17:30C-22. *Attachment and garnishment of assets*

During the pendency of delinquency proceedings in this or any reciprocal state, no action or proceeding in the nature of an attachment, garnishment or execution shall be commenced or maintained in the courts of this State against the delinquent insurer or its assets. Any lien obtained by any such action or proceeding within 4 months prior to the commencement of any such delinquency proceeding or at any time thereafter shall be void as against any rights arising in such delinquency proceeding.

17:30C-23. *Uniform insurers liquidation act*

a. Subsections b. through k. of section 1, subsections a. and c. of section 4, together with sections 5 and 15 through 23 constitute and may be referred to as the Unifrom Insurers Liquidation Act.

b. The Uniform Insurers Liquidation Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it. To the extent that its provisions when applicable conflict with other provisions of this act, the provisions of such act shall control.

17:30C-24. *Borrowing on pledge of assets*

For the purpose of facilitating the rehabilitation, liquidations, conservation or dissolution of an insurer pursuant to this act, the commissioner may, subject to the approval of the court, borrow money and execute, acknowledge and deliver notes or other evidences of indebtedness therefor, and secure the payment of the same by the mortgage, pledge, assignment, transfer in trust or hypothecation of any or all of the property of such insurer, whether real, personal or mixed, and the commissioner, subject to the approval of the court, shall have power to take any and all other action necessary and proper to consummate any such loans and to provide for the repayment thereof. The commissioner shall be under no obligation personally or in his official capacity as commissioner to repay any loan made pursuant to this act.

17:30C-25. *Voidable transfers*

a. Any transfer of, or lien upon, the property of an insurer which is made or created within 4 months prior to the granting of an order to show cause under this act with the intent of giving to any creditor or of enabling him to obtain a greater percentage of his debt than any other creditor of the same class, and which is accepted by such creditor having reasonable cause to believe that such a preference will occur, shall be voidable.

b. Every director, officer, employee, stockholder, policyholder, and any other person acting on behalf of such insurer who shall be concerned in any such act or deed and every person receiving thereby any property of such insurer or the benefit thereof shall be personally liable therefor and shall be bound to account to the commissioner.

c. The commissioner, as receiver in any proceeding under this act, may avoid any transfer of, or lien upon the property of an insurer which any creditor, stockholder or policyholder of such insurer might have avoided, and may recover the property so transferred, or its value from the person to whom it was transferred, unless such person was a bona fide holder for value prior to the date of the granting of an order to show cause under this act. Such property or its value may be recovered from anyone who has received it, except a bona fide holder for value as above specified.

17:30C-26. *Priority of claims for compensation*

a. Compensation actually owing to employees other than officers of an insurer, for services rendered within 3 months prior to the commencement of a proceeding against the insurer under this act, but not exceeding $1,000.00 for each such employee, shall be paid prior to the payment of any other debt or claim, and in the discretion of the commissioner, may be paid as soon as practicable after the proceeding has been commenced; except, that at all times the commissioner shall reserve such funds as will, in his opinion, be sufficient for the expenses of administration.

b. Such priority shall be in lieu of any other similar priority which may be authorized by law as to the wages or compensation of such employees.

c. The priorities of distribution in a liquidation proceeding shall be in the following order:

(1) Expenses of administration;

(2) Compensation of employees as provided in subsection (a) of this section;

(3) Claims for taxes and debts due to Federal or any state or local government which are secured by liens perfected prior to the commencement of delinquency proceedings;

(4) Claims by policyholders, beneficiaries and insurers arising from and within the coverage of and not in excess of the applicable limits of insurance policies and insurance contracts issued by the company and liability claims against insurers which claims are within the coverage of and not in excess of the applicable limits of insurance policies and insurance contracts issued by the company and claims presented by the New Jersey Property-Liability Insurance Guaranty Association and claims presented by any similar organization in another state.

(5) All other claims.

17:30C-27. *Offsets*

a. In all cases of mutual debts or mutual credits between the insurer and another person in connection with any action or proceeding under this act, such credits and debts shall be set off and the balance only shall be allowed or paid, except as provided in subsection b. below.

b. No offset shall be allowed in favor of any such person where

(1) The obligation of the insurer to such person would not at the date of the entry of any liquidation order, or at such other date determined by the court for fixing the rights and liabilities with respect to the estate of the insurer, have entitled him to share as a claimant in the assets of the insurer; or

(2) The obligation of the insurer to such person was purchased by or transferred to such person with a view of its being used as an offset; or

(3) The obligation of such person is to pay a balance upon a subscription to the capital stock of a stock insurer.

17:30C-28. *Allowance of certain claims*

a. No contingent claim shall share in a distribution of the assets of an insurer which has been adjudicated to be insolvent by an order made pursuant to section 30 a., except that such claims shall be considered, if properly presented, and may be allowed to share where

(1) Such claim becomes absolute against the insurer on or before the last day fixed for filing of proofs of claim against the assets of such insurer; or

(2) There is a surplus and the liquidation is thereafter conducted upon the basis that such insurer is solvent.

b. Where an insurer has been so adjudicated to be insolvent, any person who has a cause of action against an insured of such insurer, shall have the right to file a claim in the liquidation proceeding, regardless of the fact that such claim may be contingent, and such claim may be allowed

(1) If it may be reasonably inferred from the proof presented upon such claim that such person would be able to obtain a judgment upon such cause of action against such insured; and

(2) If such person shall furnish suitable proof, unless the court, for good cause shown, shall otherwise direct, that no further valid claims against such insurer arising out of

his cause of action, other than those already presented, can be made; and

(3) If the total liability of such insurer to all claimants arising out of the same act of its insured shall be no greater than its maximum liability would be, were it not in liquidation.

c. No judgment against such an insured, taken after the date of the entry of the liquidated order, shall be considered in the liquidation proceedings as evidence of liability, or of the amount of damages, and no judgment against an insured taken by default, inquest or by collusion prior to the entry of the liquidation order, shall be considered as conclusive evidence in the liquidation proceeding, either of the liability of such insured to such person upon such cause of action, or of the amount of damage to which such person is therein entitled.

17:30C-29. *Allowance of secured claims*

No claim of any secured claimant shall be allowed at a sum greater than the difference between the value of the claim without security and the value of the security itself as of the date of the entry of the order of liquidation, or such other date set by the court for fixation of rights and liabilities, unless the claimant shall surrender his security to the commissioner, in which event the claim shall be allowed in the full amount for which it is valued.

17:30C-30. *Time to file the claims*

a. If upon the granting of an order of liquidation under this act, or at any time thereafter during the liquidation

proceeding, the insurer shall not be clearly solvent, the court shall, after such notice and hearing as it deems proper, make an order declaring the insurer to be insolvent. Thereupon, regardless of any prior notice which may have been given to creditors, the commissioner shall notify all persons who may have claims against such insurer and who have not filed proper proofs thereof, to present the same to him, at a place specified in such notice, within 4 months from the date of the entry of such order, of, if the commissioner shall certify that it is necessary, within such longer time as the court shall prescribe. The last day for the filing of proofs of claims shall be specified in the notice. Such notice shall be given in a manner determined by the court.

b. Proofs of claim may be filed subsequent to the date specified, but no such claim shall share in the distribution of the assets until all allowed claims, proofs of which have been filed before said date, have been paid in full, with interest.

17:30C-31. *Proposal for disbursement of assets of insolvent companies; application for approval; notice of application*

a. Within 120 days of a final determination of insolvency of a company by a court of competent jurisdiction of this State, the commissioner shall make application to the court for approval of a proposal to disburse assets out of such company's marshaled assets, from time to time as such assets become available, to the New Jersey Property-Liability Insurance Guaranty Association and to any similar organization in another state having substantially the same provision of law.

b. Such proposals shall at least include provision for:

(1) Reserving amounts for the payment of the expenses of administration and the claims falling within priorities established in section 26 of the act to which this act is amendatory.

(2) Disbursement of the assets marshaled to date and subsequent disbursements of assets as they become available.

(3) Equitable allocation of disbursements to the New Jersey Property-Liability Guaranty Association and similar associations established in other states which are entitled thereto; and

(4) The securing by the receiver from each of such associations entitled to disbursements pursuant to this section of an agreement to return to the receiver such assets previously disbursed as may be required to pay claims of secured creditors and claims falling within the priorities established in section 26 of P.L.1975, c. 113 (C. 17:30C-26), in accordance with such priorities. No bonds shall be required of any such association.

c. The receiver's proposal shall provide for disbursements to the associations in amounts at least equal to the payments made or to be made thereby for which such association could assert claims against the receiver and shall further provide that if the assets available for disbursement from time to time do not equal or exceed the amounts of such payments made or to be made by the associations then disbursements shall be in the amount of available assets.

d. Notice of intention to apply for approval of a disbursement of assets shall be given to the associations in and

to the commissioners of insurance of each of the states. Any such notice shall be deemed to have been given when deposited in the United States certified mails, first class postage fee paid, at least 30 days prior to submission of such application to the court. Action on the application may be taken by the court provided the above required notice has been given and provided further that the receiver's proposal complies with subsection (b)(1) and (b)(4) of this section.

N.J.S.A. 17:32-13

17:32-13. *Surrender of certificate of authority; return of securities*

An insurance company of another state or foreign country authorized to transact the business of insuring against loss or damage on account of neglect or breaches of duty or obligations guaranteed by the insurer, may at any time surrender to the commissioner its certificate of authority and thereafter cease to engage in the business. The company shall thereupon be entitled to the release and return of its securities so deposited, in manner following:

The company shall file with the commissioner a statement in writing, under oath, giving the date, name and amount of all its then existing obligations of suretyship or indemnity in this state, setting out the facts of each case. The commissioner after an examination of the facts, shall require the company to file with the comptroller a bond to the state, in the penalty of not less than twenty thousand nor more than fifty thousand dollars, executed by the company and two or more responsible freeholders of this state, or a company of this

state, duly authorized to transact such business, conditioned for the prompt fulfillment by the company of all its said outstanding obligations of suretyship and indemnity, and stipulating that the makers of the bond may be joined as defendants in any action upon any of the said obligations of suretyship or indemnity of the company, and that if judgment in the action is rendered against the company it may at the same time be rendered and enforced against the makers of the bond, without further or other action against them. The bond shall stand for the security and benefit of all persons interested in the outstanding obligations of suretyship and indemnity. Upon approving and filing the bond the comptroller shall deliver the securities to the company.

N.J.S.A. 39:6A-3

39:6A-3. *Compulsory automobile insurance coverage; limits*

Every owner or registered owner of an automobile registered or principally garaged in this State shall maintain automobile liability insurance coverage, under provisions approved by the Commissioner of Insurance, insuring against loss resulting from liability imposed by law for bodily injury, death and property damage sustained by any person arising out of the ownership, maintenance, operation or use of an automobile wherein such coverage shall be at least in:

a. an amount or limit of $15,000.00, exclusive of interest and costs, on account of injury to, or death of, one person, in any one accident; and

b. an amount or limit, subject to such limit for any one person so injured or killed, of $30,000.00, exclusive of interest and costs, on account of injury to or death of, more than one person, in any one accident; and

c. an amount or limit of $5,000.00, exclusive of interest and costs, for damage to property in any one accident.

No licensed insurance carrier shall refuse to renew the required coverage stipulated by this act without the consent of the Commissioner of Insurance.

N.J.S.A. 39:6A-4

39:6A-4. *Personal injury protection coverage, regardless of fault*

Every automobile liability insurance policy insuring an automobile as defined in this act against loss resulting from liability imposed by law for bodily injury, death and property damage sustained by any person arising out of ownership, operation, maintenance or use of an automobile shall provide additional coverage, as defined herein below, under provisions approved by the Commissioner of Insurance, for the payment of benefits without regard to negligence, liability or fault of any kind, to the named insured and members of his family residing in his household who sustained bodily injury as a result of an accident involving an automobile, to other persons sustaining bodily injury while occupying the automobile of the named insured or while using such automobile with the permission of the named insured and to pedestrians, sustaining bodily injury caused by the named insured's automobile or struck by an object propelled by or from such automobile. "Additional coverage" means and includes:

a. Medical expense benefits. Payment of all reasonable medical expenses incurred as a result of personal injury sustained in an automobile accident. In the event of death, payment shall be made to the estate of the decedent. In

the event benefits paid by an insurer pursuant to this subsection are in excess of $75,000.00 on account of personal injury to any one person in any one accident, such excess shall be paid by the insurer in consultation with the Unsatisfied Claim and Judgment Fund Board and shall be reimbursable to the insurer from the Unsatisfied Claim and Judgment Fund pursuant to section 2 of this act.

b. Income continuation benefits. The payment of the loss of income of an income producer as a result of bodily injury disability, subject to a maximum weekly payment of $100.00, per week. Such sum shall be payable during the life of the injured person and shall be subject to an amount or limit of $5,200.00, on account of injury to any one person, in any one accident.

c. Essential services benefits. The payment of essential services benefits to an injured person shall be made in reimbursement of necessary and reasonable expenses incurred for such substitute essential services ordinarily performed by the injured person for himself, his family and the members of the family residing in the household, subject to an amount or limit of $12.00 per day. Such benefits shall be payable during the life of the injured person and shall be subject to an amount or limit of $4,380.00, on account of injury to any one person in any one accident.

d. Survivor benefits. In the event of the death of an income producer as a result of injuries sustained in an accident entitling such person to benefits under section 4 of this act, the maximum amount of benefits which could have been paid to the income producer, but for his death, under section 4 b. shall be paid to the surviving spouse, or in the event there is no sur-

viving spouse, then to the surviving children, and in the event there are no surviving spouse or surviving children, then to the estate of the income producer.

In the event of the death of one performing essential services as a result of injuries sustained in an accident entitling such person to benefits under section 4 c. of this act, the maximum amount of benefits which could have been paid such person, under section 4 c., shall be paid to the person incurring the expense of providing such essential services.

e. Funeral expenses benefits. All reasonable funeral, burial and cremation expenses, subject to a maximum benefit of $1,000.00, on account of the death of any one person in any one account shall be payable to decedent's estate.

Benefits payable under this section shall not be assignable or subject to levy, execution, attachment or other process for satisfaction of debts.

N.J.S.A. 39:6A-8

39:6A-8. *Tort exemption; limitation on the right to damages*

Every owner, registrant, operator or occupant of an automobile to which section 4, personal injury protection coverage, regardless of fault, applies, and every person or organization legally responsible for his acts or omissions, is hereby exempted from tort liability for damages to any person who is required to maintain the coverage mandated by this act, or to any person who has a right to receive benefits under section 4 of this act as a result of bodily injury, arising out of the

ownership, operation, maintenance or use of such automobile in this State, if the bodily injury, is confined solely to the soft tissue of the body and the medical expenses incurred or to be incurred by such injured person or the equivalent value thereof for the reasonable and necessary treatment of such bodily injury, is less than $200.00, exclusive of hospital expenses, X-rays and other diagnostic medical expenses. There shall be no exemption from tort liability if the injured party has sustained death, permanent disability, permanent significant disfigurement, permanent loss of any bodily function or loss of a body member in whole or in part, regardless of the right of any person to receive benefits under section 4 of this act. Bodily injury confined solely to the soft tissue, for the purpose of this section means, injury in the form of sprains, strains, contusions, lacerations, bruises, hematomas, cuts, abrasions, scrapes, scratches, and tears confined to the muscles, tendons, ligaments, cartilages, nerves, fibers, veins, arteries and skin of the human body.

N.J.S.A. 39:6A-10

39:6A-10. *Additional personal injury protection coverage*

Insurers shall make available to the named insured covered under section 4, and, at his option, to resident relatives in the household of the named insured, suitable additional first-party coverage for income continuation benefits, essential services benefits, death benefits and funeral expense benefits, but the income continuation and essential service benefits shall cease upon the death of the claimant, and shall not operate to increase the amount of any death benefits payable under section 4 and such

additional first party coverage shall be payable only to the extent that the claimant establishes that the amount of loss sustained exceeds the coverage specified in section 4. The additional coverage shall be offered by the insurer at least annually on a form prescribed by the Commissioner of Insurance, which shall be attached to or accompany all applications, initial policies and renewal policies or renewal notices. Income continuation in excess of that provided for in section 4 must be provided as an option by insurers for disabilities, as long as the disability persists, up to an income level of $35,000.00 per year, provided that a. the excess between $5,200.00 and the amount of coverage contracted for shall be written on the basis of 75% of said difference, and b. regardless of the duration of the disability, the benefits payable shall not exceed the total maximum amount of income continuation benefits contracted for. The Commissioner of Insurance is hereby authorized and empowered to establish, by rule or regulations, the amounts and terms of income continuation insurance to be provided pursuant to this section.

New Jersey Administrative Code

N.J.A.C. 11:3-1.13

11:3-1.13 *Three-year assignment period*

(a) A risk shall be assigned to a designated company for the period of three consecutive years. If a risk is unable to obtain insurance for itself at the end of the three-year period, reapplication for insurance may be made to the Plan.

(b) Such reapplication shall be considered as a new application.

(c) In the case of nonresident military personnel, as described under Section 1.3 (Residents and nonresidents) of this Chapter the designated company shall not be required to renew if at the time of renewal the insured is stationed in another state and his automobile is not registered in New Jersey.

N.J.A.C. 11:3-1.16

11:3-1.16 *Rates*

(a) Risks defined in Subchapters 2 through 5 of this Chapter shall be subject to the rules, rates, surcharges, minimum premiums and classifications approved for all companies subscribing to this Plan as filed on their behalf by the Automobile Insurance Plans Service Office.

1. Subchapter 2 (Supplement of Rules and Rates for Private Passenger Automobiles re Liability) and 4 (Supplement of Rules and Rates for Automobile Physical Damage Coverage) apply to risks that do not qualify for Supplement 2 of the aforementioned Subchapter.

2. Rates set forth in Subchapter 3 (Supplement of Automobile Liability Insurance—Private Passenger Rates) of this Chapter shall apply to the following types of risks:

i. The risk was insured within the 90 days preceeding application to the Plan or at the time of application to the Plan still is insured with a company authorized to write automobile insurance in New Jersey, and such risk has been refused renewal or has received from the company notice of intent not to renew like coverage by the same com-

pany with the same policy form provisions, rules, rates and classifications of the manual under which the expiring policy was written except for revisions thereof approved by the Commissioner and at the same terms as applicable to the existing policy; provided, there has been no change in the risk's characteristics which result in a change in classification requiring the application of higher rates than would apply if this change had not occurred, and the applicant owner or anyone who usually operates the automobile has been free of accidents and/or moving traffic violations that would have made him subject to additional charges provided for in this Section, and has not been convicted of two or more moving traffic violations not specified in subsection (f) of this Section, or of a high misdemeanor or felony involving the use of an automobile within the 36 months preceding the date of application, or, in the case of a renewal policy, during the 36 months preceding the effective date of the renewal policy.

Note: A person insured under the consent to higher rate provision of the New Jersey statute (N.J.S.A. 17: 29A-7.1) shall qualify for the rates as set forth in Subchapter 3 (Supplement of Automobile Liability Insurance—Private Passenger Rates) of this Chapter if he submits in lieu of a nonrenewal notice an offer from the carrier to renew coverage at rates higher than manual, or a request to complete a form consenting to such higher rates, provided he meets all other requirements for such qualification.

ii. The risk is currently insured by assignment through the Plan at the rates as set forth in Subchapter 3 (Supplement of Automobile Liability Insurance—Private Passen-

ger Rates) of this Chapter or at the rates in effect prior to June 1, 1971 in Subchapters 2 through 5 of this Chapter if the current coverage had an effective date within 12 months preceding June 1, 1971, and such risk has been free of accidents and/or moving traffic violations that would have made it subject to additional charges provided for in this Section and has not been convicted of two or more traffic violations not specified in subsection (b) of this Section or high misdemeanor or felony involving the use of an automobile within the 36 months preceding the effective date of the renewal policy.

iii. A risk which previously qualified for Subchapter 3 (Supplement of Automobile Liability Insurance—Private Passenger Rates) or risk which would have qualified under subparagraph i above at renewal, but which failed to renew its prior coverage, shall remain eligible for Subchapter 3 (Supplement of Automobile Liability Insurance—Private Passenger Rates) on subsequent applications if such risk reapplies within 60 days of the effective date of cancellation or termination; provided, such risk has been free of accidents and/or moving traffic violations that would have made it subject to additional charges provided for in this Section, and has not been convicted of two or more traffic violations not specified in subsection (b) of this Section, or of a higher misdemeanor or felony involving the use of an automobile within the 36 months preceding the date of the new application. Such reapplication shall be assigned to the previous carrier.

Note: The date of conviction shall be determining in establishing the 36 month experience period of this subsection.

(b) All other risks placed through the Plan shall be subject to the rules, rates, minimum premiums and classifica-

tions in force, and to the rating plans applicable thereto, in use by the designated company, subject to the surcharges filed on behalf of the companies subscribing to this Plan by the Automobile Insurance Plans Service Office.

(c) For the purposes of such filings, each company subscribing to this Plan is a subscriber to the Automobile Insurance Plans Service Office and authorizes the Commissioner to accept such filings in its behalf.

(d) All of the statistical data required to develop the appropriate rates shall be furnished to the Automobile Insurance Plans Service Office by each company subscribing to this Plan, or by a statistical agency designated by such company.

(e) If a company is assigned a risk in a class for which it has no rates on file, the company shall file or promulgate a reasonable rate for such applicant or class subject to the provisions of the law of the State.

(f) For private passenger automobile risks, other than fleets, an additional charge shall be made on the basis of points accumulated during the 36 months immediately preceding the date of application for assignment, and in the case of renewal, during the 36th months immediately preceding the effective date of the renewal policy. Points shall be assigned for convictions and accidents involving the applicant as an owner or operator and for convictions and accidents involving anyone who usually operates the motor vehicle.

1. Six points shall be assigned for each of the following convictions:

i. Driving a motor vehicle while under the influence of intoxicating liquor or narcotic drugs;

ii. Failing to stop and report when involved in an accident;

iii. Homicide or assault arising out of the operation of a motor vehicle; or

iv. Operating a motor vehicle without an operator's or chauffeur's license or registration or during a period of revocation or suspension thereof.

2. Four points shall be assigned for:

i. The accumulation of points under a State point system or a series of convictions as a result of which the filing of evidence of financial responsibility under any financial responsibility law is required as of the effective date of the policy; or

ii. Any moving traffic violation as a result of which an operator's license was suspended or revoked; or a filing of evidence of financial responsibility under any financial responsibility law is required as of the effective date of the policy.

3. Three points shall be assigned for each of the following convictions:

i. Permitting an unlicensed person to drive;

ii. Loaning an operator's or chauffeur's license to an unlicensed operator; or

iii. Any moving traffic violations not otherwise specified which result in the accumulation of six or more points as defined in the New Jersey Motor Vehicle Law.

4. Two points shall be assigned for each of the following convictions:

i. Obtaining a license or registration through deception of any kind; or

ii Driving a motor vehicle in a reckless manner.

Note: For the purposes of paragraphs 1-4 above, the following shall not be regarded as moving traffic violations:

(1) Any motor vehicle "equipment" requirement of the motor vehicle and traffic laws, except brakes;

(2) Failure to display proper number plates provided such plates are in existence; or

(3) Failure to have in possession operator's or chauffeur's license, provided there is one in existence.

5. Two points shall be assigned for each accident involving the applicant, or any operator of the automobile resident in the same household, while operating any private passenger type automobile or motorcycle resulting in bodily injury or death, or resulting in damage to any property, including his own, of $100.00 or more, excluding any loss adjustment expenses.

6. One point shall be assigned for each property damage accident for which points have not been assigned under paragraph 5 above because the damage was less than $100.00, excluding any loss adjustment expenses.

7. No points shall be assigned under this subsection against the applicant:

i. For involvement in an accident which occurred while the motor vehicle owned or operated by the ap-

plicant or other person who usually drives the applicant's motor vehicle was lawfully parked;

ii. For involvement in an accident in which the motor vehicle was struck by a hit-and-run driver, if such accident was reported to the proper authority within 24 hours;

iii. For involvement in an accident as a result of which the applicant or other person who usually drives the applicant's motor vehicle obtained a judgment against, or a settlement from or on behalf of, the owner or operator of another vehicle involved in such accident, if the judgment or settlement was obtained prior to the date of application or, in the case of renewal, prior to the effective date of the renewal policy; and further provided no judgment was obtained against, nor any amount paid in settlement by or on behalf of, the applicant or other person who usually drives the applicant's motor vehicle, as a result of such accident;

iv. For involvement in an accident in connection with which neither the applicant or other person who usually drives the applicant's motor vehicle was convicted of a moving traffic violation, and the owner or operator of another vehicle involved was so convicted; nor

v. For physical damage losses other than collision.

8. Two points shall be assigned if the principal operator of the automobile has not been licensed for three years.

9. Additional charges for points shall be made on the basis of the following:

PERCENTAGE OF ADDITIONAL CHARGES

	Liability Including Medical Payments	Collision
1 Penalty point	20	10
2 Penalty points	40	20
3 Penalty points	65	35
4 Penalty points	90	45
5 Penalty points	120	60
6 Penalty points	150	75
7 Penalty points	185	90
8 Penalty points	220	110

Note: Irrespective of the classification of the risk, additional charges under this section shall be determined by applying the proper percentage to the total limits Class 4A premium for the appropriate rating territory as specified in Subchapter 3 (Supplement of Automobile Liability Insurance—Private Passenger Rates) of this Chapter.

Note: Points applicable to risks of two, three or four motor vehicles shall be applied first to the highest rated motor vehicle, and any points in excess of eight shall be applied to the next highest rated motor vehicle or motor vehicles in succession.

(g) Additional charges for risks, other than private passenger nonfleet shall apply as follows: (Note: With respect to motorcycles, motorized scooters and so forth, the following surcharges are applicable only to the collision portion of the premiums.)

1. An additional charge of 35 per cent shall be made if the applicant or anyone who usually drives the motor vehicle has, during the 36 months immediately preceding the date of application for assignment, and in the case of renewal, during the 36 months immediately preceding the effective date of the renewal policy:

i. Been involved as an operator or an owner in more than one motor vehicle accident resulting in injury to or death of any person or damage to property, provided that if the risk is subject to a debit of 35 per cent or more under an approved experience rating plan, such debit shall be deemed to include the additional charge of 35 per cent, and if the debit is less than 35 per cent, the additional charge of 35 per cent shall be deemed to include the experience debit;

ii. Been convicted of any of the following violations:

(1) Driving a motor vehicle while under the influence of intoxicating liquor or narcotic drugs;

(2) Failing to stop and report when involved in an accident;

(3) Homicide or assault arising out of the operation of a motor vehicle;

(4) Driving a motor vehicle at an excessive rate of speed where injury to person or damage to property results therefrom;

(5) Driving a motor vehicle in a reckless manner where injury to person or damage to property results therefrom;

(6) Operating during period of revocation or suspension of registration or license;

(7) Operating a motor vehicle without State or owner's authority;

(8) Loaning operator's license to an unlicensed operator;

(9) Permitting an unlicensed person to drive;

(10) The making of false statements in the application for license or registration;

(11) Impersonating an applicant for license or registration, or procuring a license or registration through impersonation whether for himself or another; or

iii. Been convicted more than once of any moving traffic offense, or once each for two or more traffic offenses, other than those listed in subparagraph ii above, unless all such convictions arise out of a single incident or occurrence;

iv. Been involved as an operator or an owner in a motor vehicle accident resulting in injury to or death of any person or damage to property, and been convicted of any moving traffic offense, other than those listed in subparagraph ii above unless the accident and violation constituted, or arose out of, a single incident or occurrence;

v. Been involved as an owner or operator in a motor vehicle accident or been convicted of an offense, or has had a judgment entered against him, as a result of which he has been required to furnish proof of financial responsibility under a financial responsibility law, or been required upon any other ground, under a financial responsibility law, to furnish proof of financial responsibility; or

vi. Been convicted more than once of any nonmotor vehicle offense, or once each for two or more nonmotor

vehicle offenses, as a result of which the person so convicted was sentenced to imprisonment for five or more days, or fined $50.00 or more.

2. For risks not subject to paragraph 1 of this subsection an additional charge of 10 per cent for public passenger carrying and long haul trucking risks and 25 per cent for all others shall be made if the applicant or anyone who usually drives the motor vehicle has, during the 36 months immediately preceding the date of application for assignment and in the case of renewal during the 36 months immediately preceding the effective date of the renewal policy:

i. Been involved as an operator or owner in a motor vehicle accident resulting in injury to or death of any person or damage to property, provided that if the risk is subject to a debit under an approved experience rating plan, of ten per cent or more for a public passenger carrying or long-haul trucking risk, or 25 per cent for all others, such debit shall be deemed to include the additional charge of ten per cent or 25 per cent, and if the debit is less than ten per cent for public passenger carrying or long-haul trucking risks or 25 per cent for all others the additional charge of ten per cent or 25 per cent shall be deemed to include the experience debit;

ii. Been convicted of any moving traffic offense, other than those listed in subparagraph ii of paragraph 1 of this subsection; or

iii. Been convicted of any nonmotor vehicle offense and sentenced to imprisonment for five or more days, or fined $50.00 or more.

Note: For the purposes of this subsection, the following shall not be regarded as moving traffic violations:

(1) Any motor vehicle "equipment" requirement of the motor vehicle and traffic laws, except brakes;

(2) Failure to display proper number plates, provided such plates are in existence; or

(3) Failure to have in possession operator's or chauffeur's license, provided there is one in existence.

(h) If a risk involves vehicles rated under both subsections (b) and (g) surcharges shall be applied first to the vehicle which will produce the higher dollar amount, and successively to the next such vehicle on as many vehicles as there are persons subject to surcharge.

SUBCHAPTER 8. NONRENEWAL OF AUTOMOBILE INSURANCE POLICIES FOR PRIVATE PASSENGER CARS

N.J.A.C. 11:3-8.1

11:3-8.1 *General provisions*

FOREWORD

This rule applies to all private passenger automobiles as defined in N.J.S.A. 39:6A-2a which are required to have P.I.P. coverage, excluding those owned by business entities and fleets. (Effective January 1, 1978; but penal-

ties for noncompliance will not be imposed before March 1, 1978.)

(a) Every insurer shall make an offer to the insured named in a policy providing the coverage required by the New Jersey Automobile Reparation Reform Act to renew such policy upon its expiration date, unless a valid notice of nonrenewal has been sent by the insurer to the insured in accordance with this regulation. Such renewal offer shall be in the usual form of either a renewal policy, a certificate, or a renewal bill and shall offer coverage at least as favorable to the insured as the expiring policy and at the same limits and terms including duration of contract of the policy as apply to the expiring policy, subject to changes approved by the commissioner that had become effective since the commencement of the current policy period. Payment by the insured in accordance with their terms stated in the billing notice or in accordance with terms agreed to with the company or producer shall constitute acceptance of the offer by the insured. The words "same limits" shall not preclude the insurer from offering physical damage coverage with a higher deductible than that in the expiring policy, provided the insured is informed that a lower deductible is available at an appropriate rate. Insurers must permit insureds to return to their prior duration of policy term upon request.

As amended, R.1977 d.437, eff. January 1, 1978.

See: 9 N.J.R. 435(d), 9 N.J.R. 586(b).

(b) No notice of nonrenewal shall be valid unless it is mailed or delivered by the insurer to the insured no less than 60 days and no more than 90 days prior

to the expiration of the current policy, setting forth the reason(s) for such nonrenewal. In lieu of stating such reason(s), the notice may name the person or persons giving cause for the nonrenewal, in which case the reason for nonrenewal shall be communicated in a separate letter to such person or persons.

1. No notice of nonrenewal shall be valid unless it includes the text of the designated portion of this rule under which action is being taken and the correct facts which bring the insured under the rule, including dates and any other facts necessary for identification of the incidents. In the event action is being taken under subsection (e)1 of this section, the text of the exceptions under subsection (e)2 must be included together with a statement, if true, that none of these exceptions are applicable. (Effective February 21, 1977, for notices sent on or after that date.)

(c) Nothing in this regulation shall be construed as prohibiting a renewal policy from being issued for higher limits of coverage and/or additional coverage(s), provided that such additional protection is specifically requested by the insured and the insurer is willing to provide it. Conversely, nothing shall prohibit the renewal policy from being issued for lower limits of coverage and/or fewer coverages provided that such reduction in protection is specifically requested by the insured person and provided further that coverage in no case shall fall below the level or levels otherwise required by law.

(d) Notice of non-renewal based upon one or more of the reasons stated below shall be deemed to have the consent of the Commissioner of Insurance required under Section 3 of the New Jersey Automobile Reparations Act. Any

refusal to renew an automobile insurance policy not based upon such reasons shall be submitted to the Commissioner of Insurance no later than 90 days prior to the expiration of the policy and shall only be issued to the insured with the consent of the Commissioner.

(e) No nonrenewal shall be valid unless it is based on one or more of the following:

1. Accident involvement: The named insured or any operator of an automobile resident in the same household who customarily operates the automobile or any other operator who customarily operates the automobile has been involved during the 36 months period ended 90 days prior to the expiration of the current policy in

i. More than one bodily injury accident if there is one car in the household or an average of more than one accident for all cars in the household, provided a loss payment has been made or a loss reserve has been established for such accidents other than a payment or reserve for the personal injury protection benefits, or

ii. More than one accident involving damage to any property including his own of $200.00 or more for which accident a payment was made or a loss reserve was established if there is one car in the household, or an average of more than one such accident for all cars in the household, provided that loss payments or reserves under the comprehensive physical damage coverage shall not be counted, or

iii. A combination of more than one such bodily injury or property damage accident, or

iv. If the named insured or anyone customarily operating the automobile has been involved in more than two such accidents regardless of the number of cars in the household.

2. Exceptions: Accidents under i. to iv. above shall not be counted if the accident occurred under the following circumstances:

i. Accident involved a claim or payment only under the Personal Injury Protection Coverage;

ii. Automobile lawfully parked (an automobile rolling from a parked position shall not be considered as lawfully parked, but shall be considered as the operation of the last operator);

iii. Named insured or other operator residing in the same household, reimbursed by, or on behalf of, a person responsible for the accident or has judgment against such persons;

iv. Automobile of the named insured or other operator resident in the same household struck in rear by another vehicle, and the operator has not been convicted of a moving traffic violation in connection with the accident;

v. Operator of the other automobile involved in such accident was convicted of a moving traffic violation and the named insured or other operator resident in the same household was not convicted of a moving traffic violation in connection therewith;

vi. Automobile operated by named insured or other operator resident in the same household is damaged as a result of contact with a "hit and run" driver, if the acci-

dent was reported to legal authority within a reasonable time thereafter;

vii. Accidents involving damage by contact with animals or fowl.

3. Convictions concerning motor vehicle law: The named insured or any operator of an automobile resident in the same household who customarily operates the automobile or any other operator who customarily operates the automobile.

i. Has been convicted, entered a plea of guilty or nolo contendere, forfeited bail bond or other security for any one of the following motor vehicle law violations during the 36 months ended 90 days prior to the expiration date of the current policy:

(1) Driving while intoxicated or under the influence of drugs;

(2) Leaving the scene of an accident;

(3) Criminal negligence or assault arising out of the operation of a motor vehicle;

(4) Driving while license is suspended or revoked.

ii. Has been convicted, entered a plea of guilty or nolo contendere, or forfeited bail bond or other security for other moving traffic violations during the 36 months period ended 90 days prior to the expiration of the current policy which result in the accumulation of an average of nine points or more as defined in the New Jersey Motor Vehicle Law per car in the household or which result in an accumulation of nine or more points for any one such operator, provided that any operator who has been involved in such motor vehicle law violations continues to be an operator of the automobile at the time of renewal.

4. Convictions other than motor vehicle laws: The named insured or anyone customarily operating the automobile is convicted, entered a plea of guilty or nolo contendere, forfeited bail bond or other security for obtaining or attempting to obtain from any other person, insurance company or the unsatisfied claim and judgment fund any money or any other thing of value by falsely or fraudulently representing that such person is entitled to such consideration under the automobile insurance policy, or falsely and fraudulently making statement or presenting documentation in order to obtain such consideration, or by cooperating, conspiring or otherwise acting in concert with any person seeking to obtain or attempting to obtain falsely or fraudulently such consideration.

5. Use of the automobile in professional racing.

6. Physical or mental impairment of the named insured or anyone customarily operating the automobile which adversely affects the ability to operate the automobile safely, unless a physical disability is compensated for.

7. Refusal to submit to a medical examination at company expense where there is reason for the company to doubt an operator's ability to operate the automobile safely.

8. Addition of an operator of the automobile during the policy term or for the new policy term with respect to whom any of the above causes for nonrenewal would apply.

9. In the case of companies which limit their writing to members of a church, profession or occupation or similar group, loss of the qualification for such group by the

owner of the automobile. In such case an additional 12 months of nonrenewal notice shall be given. Termination of membership in an automobile or travel club shall not fall under this provision.

10. Failure by an insured under the policy to comply with the cooperation or subrogation clause of the policy, subject to reasonable rules established by the commissioner.

11. Request by producer of record not to renew policy, provided such request is accompanied by a true statement by the producer that he has replaced like coverage at approved rates in the voluntary market with an admitted carrier, specifying the name of the carrier; provided also that the transferor carrier has advised the insured in writing of his right to renewal in the same company before obtaining the insured's consent to transfer, and of the insured's right to renew if he or she is cancelled by the new carrier for reasons other than nonpayment or suspension or revocation of registration or driver's license. The producer's request for nonrenewal shall be made no later than 90 days prior to the expiration of the policy and a copy thereof shall be sent by the producer to the named insured. A nonrenewal based on such request shall be invalid and the company shall renew the policy at the request of the insured through an active agent and/or broker, or directly if the replacement policy is cancelled by the carrier for any reason other than the reasons allowed for cancellation by N.J.S.A. 17:29C-7 (nonpayment of premium or suspension or revocation of registration or driver's license).

(f) Failure by a terminated agent to request renewal during the period of nine months from the effective date of

termination as provided in N.J.S.A. 17:22-6.14(a) shall be construed as request not to renew in the context of this regulation.

(g) This rule shall apply to all private passenger automobile coverages when included in a policy providing for statutorily mandated personal injury protection and liability coverage.

New Jersey Court Rules

Rule 2:2-1(a)

2:2-1. *Appeals to the Supreme Court from Final Judgments*

(a) As of Right. Appeals may be taken to the Supreme Court from final judgments as of right: (1) in cases determined by the Appellate Division involving a substantial question arising under the Constitution of the United States or this State; (2) in cases where, and with regard to those issues as to which, there is a dissent in the Appellate Division; (3) directly from the trial courts in cases where the death penalty has been imposed and in post-conviction proceedings in such cases; (4) in such cases as are provided by law.

Rule 4:34-4

4:34-4. *Public Officers; Death or Separation from Office*

When any public officer sues or is sued in his official capacity whether or not his name is mentioned, and then dies, resigns or for any reason ceases to hold office, his succes-

sor in office shall be deemed to have been substituted in his place unless the court on motion otherwise orders; but the court may on motion specially order the substitution of such successor in office.

NO. 82-1153

Office-Supreme Court, U.S.
FILED
MAR 14 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MOTOR CLUB OF AMERICA INSURANCE COMPANY,
A Corporation of the State of New Jersey,

Appellant,

vs.

STATE OF NEW JERSEY, STATE OF NEW JERSEY DEPARTMENT OF INSURANCE and JAMES J. SHEERAN, NEW JERSEY COMMISSIONER OF INSURANCE,

Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION OF APPELLEES STATE OF NEW JERSEY STATE OF NEW JERSEY DEPARTMENT OF INSURANCE AND COMMISSIONER OF INSURANCE TO DISMISS OR AFFIRM

IRWIN I. KIMMELMAN,
Attorney General of New Jersey,
Attorney for Appellees, State of New Jersey, State of New Jersey Department of Insurance and James J. Sheeran, New Jersey Commissioner of Insurance,
Richard J. Hughes Justice Complex
CN 112,
Trenton, New Jersey 08625.
(609) 292-8917

JAMES J. CIANCIA,
Assistant Attorney General,
Of Counsel.

JOHN J. HAYDEN,
Deputy Attorney General,
On the Brief.

Adams Press Corp., 50 Park Place, Newark, New Jersey 07102—(201) 623-8611

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
MOTION OF APPELLEES STATE OF NEW JERSEY, STATE OF NEW JERSEY DEPARTMENT OF INSURANCE AND COMMISSIONER OF INSURANCE, TO DISMISS OR AFFIRM	1
COUNTER-STATEMENT OF THE CASE	2
ARGUMENT—The judgment of the Appellate Division of the Superior Court of New Jersey dismissing all aspects of appellant's claim of an unconstitutional taking of appellant's property effected by the insurance regulatory laws of the State of New Jersey, and the New Jersey Supreme Court's refusal to review that judgment, should be affirmed since they are plainly correct, or the present appeal should be dismissed since it fails to raise a substantial federal issue, does not present an issue of broad importance and is consistent with federal precedent	7
CONCLUSION	15
APPENDIX: Statutory Material and Court Rules:	
N.J.S.A. 17:29A-10	1a
N.J.S.A. 17:29A-11	1a
N. J. Court Rule 2:2-3	2a
N. J. Court Rule 2:12-9	3a
P. L. 1983, c. 65 (February 10, 1983)	4a

PAGE

Table of Authorities

Cases Cited

Aetna Casualty and Surety Company v. Com. of Ins., 358 Mass. 272, 263 N.E. 2d 698 (Sup. Jud. Ct. 1970) 11

Aetna Insurance Company v. Hyde, 315 Mo. 113, 285 S.W. 65 (Sup. Ct. 1926), cert. granted 273 U.S. 681 cert. dism. 275 U.S. 440 (1928) 11

Bluefield Water Works & Imp. Co. v. Public Svc. Comm., 262 U.S. 679, 43 S. Ct. 675, 67 L. Ed. 1176 (1924) 9

California State Auto Assn. Inter-Insurance Bureau v. Maloney, 341 U.S. 105 (1951) 7

Central R.R. Co. v. Neeld, 26 N. J. 172, 139 A. 2d 110 (1958), cert. den. 357 U.S. 928 (1958) 10, 11

Garrity v. New Jersey, 385 U.S. 493 (1967) 14

Georgia Railway & Power Co. v. Railroad Comm., 278 F. 242 (D. Ga. 1922), aff'd 262 U.S. 625 (1923) 9

Home Fuel Oil Co. v. Glen Rock, 118 N. J. L. 340 (Sup. Ct. 1927) 12

In re Application of Insurance Rating Board, 63 N. J. 413 (1973) 10

In re Insurance Rating Board, 55 N. J. 19 (1969) ..10, 12

In re N. J. Power & Light, 9 N. J. 498 (1952) 9

Jordan v. American Eagle Fire Ins. Co., 169 F. 2d 281 (D.C. Cir. 1948) 11

N. J. Land Title Ins. Rating Bureau v. Sheeran, 151 N. J. Super. 45 (App. Div. 1977) 11

PAGE

Opinion of the Justices, 334 Mass. 711, 134 N.E. 2d 923 (Sup. Jud. Ct. 1956) 9

Sheeran v. Nationwide Mutual Ins. Co., 80 N. J. 548, 560 (1979) 10

State v. Wenof, 102 N. J. Super. 370 (Law Div. 1978) 12

Switz v. Middletown Tp., 23 N. J. 580 (1957) 11

Statutes Cited

N.J.S.A. 17:17-1 11

N.J.S.A. 17:29A-1 et seq. 7, 11

N.J.S.A. 17:29A-3 2

N.J.S.A. 17:29A-7 10

N.J.S.A. 17:29A-10 11

N.J.S.A. 17:29A-11 10

N.J.S.A. 17:29A-14 11

N.J.S.A. 17:29A-24 10

N.J.S.A. 17:29D-1 ..... 7, 13

N.J.S.A. 17:30C-1 et seq. 3, 4, 7, 8, 13, 14

N.J.S.A. 39:6A-1 et seq. 7

28 U.S.C.:

Sec. 1257(2) 5, 9, 14

Session Law Cited

P. L. 1983, c. 65 (February 10, 1983) 5, 13

PAGE

Rules Cited

New Jersey Court Rules:

Rule 2:2-3(a)(2) 10

Rule 2:12-9 5

U. S. Supreme Court Rules:

Rule 16(1)(b) 1

Rule 16(1)(d) 2

Miscellaneous

Administrative Law Treatise:

Sec. 18.10 (1st ed. 1958) 12

NO. 82-1153

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MOTOR CLUB OF AMERICA INSURANCE COMPANY,
A Corporation of the State of New Jersey,

Appellant,

vs.

STATE OF NEW JERSEY, STATE OF NEW JERSEY DEPARTMENT OF INSURANCE and JAMES J. SHEERAN, NEW JERSEY COMMISSIONER OF INSURANCE,

Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION OF APPELLEES STATE OF NEW JERSEY STATE OF NEW JERSEY DEPARTMENT OF INSURANCE AND COMMISSIONER OF INSURANCE TO DISMISS OR AFFIRM

Appellees, State of New Jersey, State of New Jersey Department of Insurance and Commissioner of Insurance respectfully move to dismiss this appeal or to affirm the order of the Supreme Court of New Jersey, pursuant to Rule 16(1)(b), on the grounds that the appeal does not present a substantial federal question and that the fed-

eral question raised was not expressly passed upon and, pursuant to Rule 16(1)(d), on the grounds that this appeal does not raise any issues of special importance and that the judgment below is totally consistent with federal precedent and is so obviously correct as to warrant no further review by this Court.

Counter-Statement of the Case

Motor Club of America Insurance Company ("MCAIC" or "Appellant" herein) is a domestic insurance company organized pursuant to the laws of New Jersey. It is empowered to write all lines of property and casualty coverage (Verified Complaint, ¶4) (Aa 27a).* A major portion of MCAIC's business consists of New Jersey automobile coverage (Verified Complaint, ¶5) (Aa 27a), and MCAIC has substantially limited its business activities in other states (Aa 27a).

In accordance with N.J.S.A. 17:29A-3 (Aa 77a), MCAIC is a member of a rating organization called Insurance Services Office ("ISO"). MCAIC has been a member of ISO during all times relevant to this matter. In the past years, ISO has, on behalf of member companies, requested and received from the Commissioner of Insurance a number of increases in the permissible rates charged for private passenger automobile coverage. From 1973 until the time this suit commenced in 1980, ISO had made eleven separate requests for increases in automobile rates, ten of which had been granted (Aa 10a). While the in-

---

*As used throughout, "Ra" refers to the appendix to this motion to dismiss or affirm; "Aa" refers to the appendix to appellant's Jurisdictional Statement; and "Ab" refers to appellant's Jurisdictional Statement.

creases were in amounts less than that which had been sought by ISO, none of the rate approvals were ever challenged through appeal by either ISO or MCAIC.

In the years immediately preceding the filing of the complaint in this case, the financial condition of MCAIC had deteriorated. Policyholder surplus had greatly declined to a point where, in the view of the Commissioner, the company was on the brink of insolvency. Throughout 1980, the Commissioner monitored closely the financial status of MCAIC.

This action was initiated on October 27, 1980 by the filing of a Verified Complaint (Aa 26a) in the Chancery Division of the Superior Court of New Jersey. Appellant sought to enjoin the Commissioner from commencing liquidation or rehabilitation proceedings, pursuant to N.J.S.A. 17:30C-1 *et seq.* (Aa 84a ff.) against MCAIC, since the company feared that the Commissioner was on the verge of initiating such proceedings. MCAIC also alleged that the automobile insurance statutory and regulatory scheme, as administered, had effected a taking of its property without just compensation. MCAIC further contended that, both as a practical matter and as a matter of law, it was compelled to continue operations in New Jersey notwithstanding its ever-increasing losses, yet failed to allege any affirmative attempt to discontinue business, or even a desire to do so.

Shortly after the complaint was filed, MCAIC received an infusion of new capital which allayed the Commissioner's immediate concern that MCAIC might have been insolvent, and the count of the complaint which sought to enjoin the Commissioner from commencing liquidation proceedings was rendered moot (Aa 8a).

Appellees then moved for an order dismissing the complaint for failure to state a claim upon which relief could

be granted. It was argued that, among other things, this action represented an impermissible collateral attack on final unchallenged rate decisions, and therefore did not state a cause of action for a compensable taking.

In an opinion dated June 2, 1981 (Aa 5a ff.), the trial court granted major aspects of the state's motion (Aa 18a). The court dismissed all claims for monetary compensation. Also dismissed were all contentions that MCAIC was compelled, either by practical considerations or by N.J.S.A. 17:30C-1 *et seq.*, to continue operations in New Jersey notwithstanding growing losses. The court reasoned that a party which "fights to stay in business cannot be heard to assert that the refusal to let it cease such business is an injury . . ." (Aa 18a). The court did find, however, that Count I of the complaint stated a cause of action for declaratory relief only and refused to dismiss that part of the complaint. In addition, leave was granted to MCAIC to amend its complaint to assert a desire to stop operating.

On appeal, the Appellate Division of the New Jersey Superior Court reversed those portions of the Chancery Division order which granted leave to amend the complaint and which denied the motion to dismiss the claim for declaratory relief. The dismissal of the balance of the complaint was affirmed. The Appellate Division held, essentially, that appellant's allegations of constitutional infirmities in the insurance rating laws were of no substance, given appellant's acceptance, without one word of protest, of ten different rate increases during the time period covered by this suit, and further that appellant's challenge to the insurance company disolution statutes was not properly before the court, since appellant at no time either attempted to cease operations or was prevented from ceasing operations by the State.

A notice of petition for certification was filed in the Supreme Court of New Jersey on July 15, 1982 to review the entire Appellate Division decision, and later, on August 6, 1982, a notice of appeal to the state Supreme Court was filed. The petition for certification was denied on October 12, 1982 (Aa 21a), and, according to the rules of the New Jersey Supreme Court, that denial of certification was deemed to be a summary dismissal of the appeal. N. J. Ct. R. 2:12-9. (Ra3a).

The refusal of the Supreme Court of New Jersey to review the decision of the Appellate Division dated June 28, 1982 (Aa 1a) resulted in the filing of a Notice of Appeal with this Court on December 28, 1982 by MCAIC pursuant to 28 U.S.C. §1257(2). Subsequently, appellant filed a Jurisdictional Statement, and this motion on behalf of the State of New Jersey, the New Jersey Department of Insurance and the New Jersey Commissioner of Insurance followed.

Since the filing of the Jurisdictional Statement two significant events have occurred which bear directly on the validity of the claims of appellant and the necessity of further review of those claims by this Court. The first was the enactment of P.L. 1983, c. 65 (February 10, 1983) which embodies a substantial revision of not only the so-called "assigned risk" mechanism (for apportioning among automobile insurers those individuals required by statute to maintain auto insurance but unable to obtain it in the voluntary market), but also the rate setting procedure applicable to all lines of property and liability insurance (including auto). The statute is reproduced at Ra4a.

The second event was the filing with the New Jersey Department of Insuance of the statutorily required Annual

Statement describing appellant's operations for the year ending December 31, 1982.* The Statement, sworn to and filed by or on behalf of appellant, shows a total capital and surplus of $11,026,030, up from $3,358,107 as of December 31, 1981, for a total (positive) change in surplus as regards policyholders of $7,667,923 for the year 1982. This gain in surplus includes an underwriting profit (generally, an excess of premium income over policy claims and expenses, but not including investment income from policyholder-supplied funds) of $601,587. These gains were produced under the statutory and regulatory mechanism complained of by appellant.

* The Statement is a public record on file with the Department and can be produced for inspection if the Court deems it necessary. It is not included herein due to its size and bulk.

ARGUMENT

The judgment of the Appellate Division of the Superior Court of New Jersey dismissing all aspects of appellant's claim of an unconstitutional taking of appellant's property effected by the insurance regulatory laws of the State of New Jersey, and the New Jersey Supreme Court's refusal to review that judgment, should be affirmed since they are plainly correct, or the present appeal should be dismissed since it fails to raise a substantial federal issue, does not present an issue of broad importance and is consistent with federal precedent.

Appellant's broad assertion that the entire insurance regulatory scheme of the State of New Jersey (including the rate regulatory act in effect since 1944, N.J.S.A. 17:29A-1 *et seq.*, the assigned risk mechanism similar to one upheld against constitutional attack by this Court in *California State Auto Assn. Inter-Insurance Bureau* v. *Maloney*, 341 U.S. 105 (1951), and the laws related to the dissolution and liquidation of insurance companies, N.J.S.A. 17:30C-1 *et seq.*), is invalid on the ground of its being "repugnant to the Constitution ... of the United States," is meritless on its face and should be rejected by this Court as summarily as was done by the Supreme Court of New Jersey.

The contentions of appellant consists of two main thrusts. The first is directed at the system of rate regulation set forth in N.J.S.A. 17:29A-1 *et seq.* (and by implication both the Automobile Reparations Reform Act, or the "No-Fault" law, as it is commonly known, N.J.S.A. 39:6A-1 *et seq.* and the assigned risk mechanism created pursuant to N.J.S.A. 17:29D-1, both of which allegedly create the need for rate relief available pursuant to the rating

law). None of these statutes is challenged as being unconstitutional on its face, and no particular statute is alleged to have had an unconstitutional effect on appellant; rather, appellant simply makes the sweeping claim that all insurance regulatory acts, and the administration of those acts by the Commissioner and Department of Insurance, have effected a "taking" of its property.

Such a claim cannot stand in the face of the undisputed facts in this case: during the eight-year period encompassed by the Verified Complaint, appellant accepted, without challenge to their adequacy, rate increase after rate increase, while failing to utter one word in protest of the allegedly "coercive" administration and "substantial abuses" of the rate setting mechanism at the time those practices were supposed to have taken place. Appellant's Verified Complaint amounts to nothing more than an improper collateral attack on a series of final, unchallenged administrative actions, and appellant's failure to make use of any of several administrative and judicial remedies available at the time precludes it from claiming now that the State of New Jersey is somehow responsible for its unsuccessful operations; no substantial federal question is presented by this claim.

Appellant's second major contention is that, since 1975,* the State has compelled it to remain in business in the face of what it describes as "massive losses" (Ab 6). This compulsion is said to arise from the operation of N.J.S.A. 17:30C-1 *et seq.* (as interpreted by appellant) governing the rehabilitation and liquidation of insurance companies.

---

* Ab 5 to Ab 6. Appellant apparently concedes that Count III of its Verified Complaint (Aa 35a to Aa 36a), alleging a compulsion by the State of New Jersey to remain in business prior to 1975, notwithstanding an admittedly clear right to cease operations (Aa 34a), is without substance.

The validity of those statutes was never passed upon by the courts of New Jersey in this case, since appellant has never attempted to cease operations voluntarily and accordingly, has never been "compelled" to remain in operation by the State. This contention cannot therefore form the basis of an appeal pursuant to 28 U.S.C. §1257(2) and presents no substantial federal question for review.

It is well settled that the failure of past rates to deliver a projected return may not be corrected through future rate decisions, *Bluefield Water Works & Imp. Co.* v. *Public Svc. Comm.*, 262 U.S. 679, 694 (1924); *In re New Jersey Power & Light*, 9 N.J. 82, 86-92, 104 A.2d 1 (1954). (The converse principle, that past gains cannot be taken from an insurer and refunded, also applies, *Opinion of the Justices*, 334 Mass. 711, 134 N.E. 2d 923 (Sup. Jud. Ct. 1956).) More importantly, there is no *constitutional* entitlement that past losses be made up by rates to be applied in the future, *Bluefield Water Works, supra.* Such losses are considered a "risk of the business," *Georgia Railway & Power Co.* v. *Railroad Comm.*, 278 F. 242, 247 (D. Ga. 1922), aff'd 262 U.S. 625 (1923). If such past losses cannot be recouped through future rates, it logically follows that the past losses may not be recovered from the public regulator, where, as in this case, the regulated entity failed to invoke *any* of the statutory or judicial remedies available to correct the various "wrongs" now complained of eight years after the fact.

> To concede this as a right [that past losses are recoverable in future rate proceedings] would be to guarantee income, *and would raise a correlative duty to account for earnings beyond what were reasonable in the past.* No limit could be placed to the period of the inquiry, nor could justice really be done by it to the individual stockholders or

> consumers actually concerned, for these are constantly changing. *A rate* established as reasonable, whether by the company or by the commission, *is not guaranteed by the commission or the public.* Whether it will actually yield more or less than a fair return during its continuance is a risk of the business. We do not deny that it is within the discretion of the commission to consider the experience of the immediate past in fixing a just rate for the future, but we hold that *no legal right exists to have disappointments or surprises in results balanced.* [*Georgia Railway & Power Co.* v. *Railroad Comm., supra,* 278 F. at 247. Emphasis supplied.]

What is required of the state regulatory mechanism is that an insurer subject to it be provided the *opportunity* to secure a reasonable profit from its operations. It is clear that both the Insurance Code and the case law of this state recognize this basic premise. N.J.S.A. 17:29A-7 provides for rates "not inadequate for the safeness and soundness of the insurer . . ." (Aa 79a) and N.J.S.A. 17:29A-11 requires that a "reasonable profit for insurers" must be considered by the Commissioner in setting rates (Ra1a); see also *Sheeran* v. *Nationwide Mutual Ins. Co.,* 80 N.J. 548, 560, 404 A.2d 625 (1979); *In re Application of Insurance Rating Board,* 63 N.J. 413, 307 A.2d 604 (1973); *In re Insurance Rating Board,* 55 N.J. 19, 258 A.2d 892 (1969).

Means of assuring that the insurance laws are administered fairly and in conformity with their object are available in the form of, for example, a direct appeal pursuant to N.J.S.A. 17:29A-24 (Aa 81a) and N. J. Ct. R. 2:2-3(a)(2) (Ra2a) from an adverse rate decision, an appeal from the failure of the Commissioner to make a final decision, *Central R.R. Co.* v. *Neeld,* 26 N.J. 172, 185, 139 A.2d

110 (1958), cert. den. 357 U.S. 928 (1958), an action in the nature of mandamus in the event appellant felt that the Commissioner was unduly delaying action on a rate filing, *Switz* v. *Middletown Tp.*, 23 N.J. 580, 587, 130 A.2d 15 (1957), and the continuing statutory mechanism for amendment of and deviation from previously approved rates, N.J.S.A. 17:29A-14 (Aa80a), N.J.S.A. 17:29A-10 (Ra1a). At least ten separate rate increases were granted to ISO members (including appellant) by the Commissioner during the period of time encompassed by the complaint, and not one was subjected to a legal challenge by ISO or by appellant as inadequate, improperly negotiated or in any way inconsistent with the standards of the Rating Law, N.J.S.A. 17:29A-1 *et seq.*

Further, it cannot seriously be argued that, notwithstanding the absence of explicit authority, the Commissioner lacks the inherent authority to set interim rates in a proper case (Ab 8). "We, moreover, regard it as both essential and well settled that the scope of the Commissioner's broad administrative powers conferred by N.J.S.A. 17:17-1, 2 must be construed to include interim rate-making not expressly proscribed by statute." *N. J. Land Title Ins. Rating Bureau* v. *Sheeran*, 151 N. J. Super. 45, 53, 376 A.2d 550 (App. Div. 1977). Appellant's contention that the confiscatory effect of the rate determinations underlying its complaint could not have been presented in an appeal from a rate decision is simply incorrect. A constitutional objection that given rate levels are confiscatory is clearly justiciable. See, for example, *Aetna Insurance Company* v. *Hyde*, 315 Mo. 113, 285 S.W. 65 (Sup. Ct. 1926), cert. granted 273 U.S. 681, cert. dism. 275 U.S. 440 (1928); *Jordan* v. *American Eagle Fire Ins. Co.*, 169 F.2d 281 (D.C. Cir. 1948); *Aetna Casualty and Surety Company* v. *Com. of Ins.*, 358 Mass. 272, 263 N.E. 2d 698 (Sup. Jud. Ct. 1970). Finally, the suggestion that appellant was prevented

from appealing by the regulatory practices of the Commissioner (Ab 25 to Ab 26) is untenable; as a matter of law, an insurer is entitled to receive a less than desired increase and *also* appeal from the amount not granted, *In re Insurance Rating Board,* 55 N.J. 19, 23, 258 A.2d 892 (1969), and appellant's failure to invoke any judicial remedies to correct what it now claims were abuses of the system is fatal to its position.

The various cases cited by appellant (Ab 18) for the propositions that a "taking" is compensable, and that excessive governmental regulation may effect a "taking", are irrelevant to the issues in this case. MCAIC has long had the statutory and judicial means to avoid the very problems it now complains of (inadequate rates, excessive delays in the rate approval process, etc.) yet squandered each such opportunity as it arose.

Clearly, this aspect of the case involves nothing more than an improper collateral attack on prior final rate decisions. It is fundamental that when an administrative agency acts within its jurisdiction and its final determination comports with "due process," that agency determination is not subject to collateral attack, *State* v. *Wenof,* 102 N.J. Super. 370, 374, 246 A.2d 59 (Law Div. 1978); 2 K. Davis, *Administrative Law Treatise,* §18.10 (1st ed. 1958). When an aggrieved party has been afforded a means to directly challenge final agency action, and fails to follow the prescribed method of appeal, courts have barred that party's attack of that administrative determination in subsequent proceedings, *Home Fuel Oil* v. *Glen Rock,* 118 N.J.L. 340, 192 A.516 (Sup. Ct. 1927).

As such a collateral attack, the complaint of appellant was correctly dismissed by the courts of New Jersey, and such dismissal was consistent with both applicable state

state law and federal precedent. The claim that existing insurance regulatory acts, and the administration thereof, are the cause of "continuing" (Ab 5) losses by appellant is inconsistent with both its long period of inaction, and its year-end 1982 results of operations, as noted above. Furthermore, all of the perceived statutory inadequacies relied upon by appellant have been addressed by P.L. 1983, c. 65: Section 4(a) and (c) of that act provides for an "automatic" annual rate increase of approximately 10%-12% applicable to automobile insurance, to be effective each year upon the date of the insurer's request therefore (Ra8a); Section 4(b) provides, with respect to all property and liability lines of insurance, that a rate of filing is deemed approved unless the Insurance Commissioner takes action upon it within certain time periods set out in the statute (Ra9a); and Sections 13 to 34 of the act (Ra20a) establish a joint underwriting association in the place of the assigned risk mechanism created pursuant to N.J.S.A. 17:29D-1, thereby assuring that individual insurers such as appellant will not suffer any losses as a result of providing auto insurance to the so-called "involuntary" or "residual" market. Additional review of this claim is clearly unnecessary.

Appellant's purported challenge to the validity of the Rehabilitation and Liquidation Act, N.J.S.A. 17:30C-1 *et seq.*, is spurious and was not passed upon by the courts in this case. The plain truth is that appellant never attempted to cease operations, and in its verified Complaint, did not allege that it even desired to do so. On the contrary, one of the primary purposes of this action was to prevent the State from taking over MCAIC in a statutory delinquency proceeding and to permit it to continue in business (Aa 36a to Aa 41a). Under these cir-

cumstances, it cannot be said that the validity of N.J.S.A. 17:30C-1 *et seq.* has been "drawn in question;" appellant has continued in operation of its own volition, and not as a result of the "compulsion" of any state statute. The Appellate Division of the Superior Court expressly avoided any decision on the validity of the Rehablitation and Liquidation Act as unnecessary (Aa 3a), and the proper predicate for an appeal to this Court pursuant to 28 U.S.C. §1257(2) is lacking. *Garrity* v. *New Jersey,* 385 U.S. 493 (1967).

In summary, none of the constitutional "issues" sought to be raised by appellant are of the requisite substantiality to warrant further review. Appellant urges that it has been stripped of some "right" to hold an interminable hearing on matters which should have been raised as they happened (if, in fact, they happened at all). There are no significant constitutional issues in this case; settled principles of ratemaking (both state and federal) preclude an insurer from recovering a shortfall in rates which were reasonable, and unchallenged, when set, and sound administrative procedure requires that final rate setting decisions not be relitigated *ad infinitum.* The contention that adequate appellate review of the Commissioner's actions, and proper judicial supervision of his alleged improprieties, were unavailable is untenable in light of the statutory and case law of this State to the contrary. Furthermore, plaintiff cannot cite a single case in which an unprofitable enterprise was found to have been "compelled" to operate by the state and was therefore entitled to compensatory damages, where the enterprise offered no indication that its continued operation was anything but voluntary. The decisions of the courts of the State of New Jersey should be affirmed as being obviously correct and consistent with federal precedent,

or this appeal should be dismissed as not presenting a substantial federal question or as not presenting a federal question which was passed upon.

CONCLUSION

For the foregoing reasons, this appeal should be dismissed or the judgment of the Supreme Court of New Jersey affirmed.

Respectfully submitted,

IRWIN I. KIMMELMAN,
Attorney General of New Jersey,
Attorney for Appellees, State of New Jersey, State of New Jersey Department of Insurance and James J. Sheeran, New Jersey Commissioner of Insurance,
Richard J. Hughes Justice Complex
CN 112,
Trenton, New Jersey 08625.
(609) 292-8917

JAMES J. CIANCIA,
Assistant Attorney General,
Of Counsel.

JOHN J. HAYDEN,
Deputy Attorney General,
On the Brief.

Dated: March 9, 1983

[APPENDIX FOLLOWS]

APPENDIX

Statutory Material and Court Rules

N.J.S.A. 17:29A-10

17:29A–10. Uniform change in rates; application; order of approval or denial

A member of or subscriber to a rating organization may make a written application ~~Any insurer may apply~~ to the commissioner for ~~leave to effect~~ permission to file a uniform percentage decrease or increase ~~in the rates applied by it to a particular kind or kinds~~ to be applied to the premiums produced by the rating system filed on its behalf by such rating organization for a kind of insurance, a subdivision of a kind of insurance or for a class of insurance which is found by the commissioner to be a proper rating unit for the application of such uniform percentage decrease or increase, or otherwise deviate from the rating plans or rules so filed. The commissioner shall, ~~upon the conclusion of such hearing,~~ make an ~~such~~ order ~~as~~ approving the application if he shall deem it consistent with the establishment and maintenance of reasonable, adequate, and nondiscriminatory rates. If the commissioner shall find that such increase or decrease will result in rates that are unreasonable, inadequate, or unfairly discriminatory, he shall make an order denying the application.

N.J.S.A. 17:29A-11

17:29A–11. Commissioner, determination as to rates; factors to be considered

In every case where, pursuant to the provisions of this act, the commissioner is authorized or required to determine whether rates are reasonable and adequate, and not unfairly discriminatory, he may avail himself of the services of such experts as he may deem necessary or advisable for that purpose. In making such determination, the commissioner shall consider the factors applied by insurers and rating organizations generally in determining the bases for rates; the financial condition of the insurer; the method of operation of such insurer; the loss experience of the insurer, past and prospective, including where pertinent, the conflagration and catastrophe hazards, if any, both within and without this State; to all factors reasonably related to the kind of insurance involved; to a reasonable profit for the insurer, and, in the case of participating insurers, to policyholders' dividends. In the case of fire insurance, he shall consider the latest available experience of the fire insurance business during a period of not less than five years preceding the year in which such rates are reviewed by him.

L.1944, c. 27, p. 76, § 11.

New Jersey Court Rule 2:2-3

2:2–3. Appeals to the Appellate Division from Final Judgments, Decisions, Actions and from Rules; Tax Court

(a) As of Right. Except as otherwise provided by R. 2:2–1(a)(3) (final judgments appealable directly to the Supreme Court), appeals may be taken to the Appellate Division as of right

(1) from final judgments of the Superior Court trial divisions, or the judges thereof sitting as statutory agents; the Tax Court; the juvenile and domestic relations courts except in bastardy and paternity proceedings; the county district courts in civil actions except bastardy and paternity proceedings; and in summary contempt proceedings in all trial courts except municipal courts;

(2) to review final decisions or actions of any state administrative agency or officer, and to review the validity of any rule promulgated by such agency or officer excepting matters prescribed by R. 8:2 (tax matters) and matters governed by R. 4:74–8 (Wage Collection Section appeals), except that review pursuant to this subparagraph shall not be maintainable so long as there is available a right of review before any administrative agency or officer, unless the interest of justice requires otherwise;

(3) in such cases as are provided by law.

Final judgments of a court, for appeal purposes, shall also include those referred to by R. 4:42–2 (certification of interlocutory order), R. 4:79–8(f) (final custody determination in bifurcated matrimonial action), R. 4:94–5 (order on preliminary hearing in adoption action).

(b) By Leave. On application made pursuant to R. 2:5–6, appeals may be taken to the Appellate Division by leave granted, in extraordinary cases and in the interest of justice, from final judgments of a court of limited jurisdiction or from actions or decisions of an administrative agency or officer if the matter is appealable or reviewable as of right in a trial division of the Superior Court or in a county court, as where the jurisdiction of the court, agency or officer is questioned on substantial grounds.

New Jersey Court Rule 2:12-9

2:12–9. Where Party Appeals and at the Same Time Makes Application for Certification

Where a party seeks certification to review a final judgment of the Appellate Division and also appeals therefrom, he shall state in the petition for certification all questions he intends to raise on the appeal. The denial of certification shall be deemed to be a summary dismissal of the appeal, and the Clerk of the Supreme Court shall forthwith enter an order dismissing the appeal, unless the Supreme Court otherwise orders.

P.L. 1983, c. 65 (February 10, 1983)

[OFFICIAL COPY REPRINT]

ASSEMBLY, No. 1696

STATE OF NEW JERSEY

INTRODUCED JULY 1, 1982

By Assemblymen ADUBATO, D. GALLO, KARCHER, THOMPSON, KOSCO, LESNIAK, KELLY, DEVERIN, MARKERT and DORIA

AN ACT to revise and reform the law with respect to automobile insurance and the administration of the law with respect to property and casualty insurance, amending P. L. 1944, c. 27, P. L. 1968, c. 385, and supplementing Title 17 of the Revised Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

Matter printed in italics *thus* is new matter.

Matter enclosed in asterisks or stars has been adopted as follows:

***—Assembly committee amendments adopted September 20, 1982.**

1. Sections 1 to 12 of this act shall be known and may be cited as the "New Jersey Automobile Insurance Reform Act of 1982."

2. (New section) It is the intent and purpose of this act:

a. To require each insurer to apply on a flat and uniform fee basis per insured automobile Statewide its miscellaneous taxes, licenses, fees and at least 90% of its general expenses and acquisition, field supervision, and collection expense portions of the premium, excluding commissions.

b. To require that each insurer flatten the tax portion of the automobile insurance premium paid pursuant to P. L. 1945, c. 132 (C. 54:18A–1 et seq.) and certain assessments made pursuant to sections 4, 6 and 7 of P. L. 1952, c. 174 (C. 39:6–64, 39:6–66 and 39:6–67) on a flat uniform fee basis per insured automobile Statewide.

c. To establish the New Jersey Merit Rating Plan for convictions for motor vehicle violations and an accident surcharge system for motor vehicles based on criteria set forth in this act.

d. To require that automobile insurance rates charged any insured shall not exceed certain average rates, as determined in the act.

e. To provide that every senior citizen will receive the benefit of at least a 5% rate reduction as a result of this act.

f. To provide a modified prior approval system for private passenger automobile insurance rates as set forth in this act.

g. To establish a time guideline to assist in speeding the rate review process for all property and casualty lines, including auto-

mobile insurance, and to provide that a filing shall be deemed approved unless disapproved by the commissioner within the specified time.

h. To provide for higher deductibles on collision and comprehensive coverage, an increase in uninsured motorist coverage, and underinsured motorist coverage for private passenger automobile insurance.

i. To provide the funds necessary to modernize the operations and improve the effectiveness and efficiencies of the Division of Motor Vehicles so as to permit the division to discharge its statutory obligations relating to the automobile insurance system.

j. To provide by the enactment of all these reforms that automobile insurance will be affordable, available, and more equitable to the motorists of this State, and, in conjunction therewith, to create a study commission to evaluate the automobile insurance market and issue a report and its recommendation thereon within three years of the operative date of this act.

3. Section 1 of P. L. 1944, c. 27 (C. 17:29A–1) is amended to read as follows:

1. As used in this act,

(a) "Rate" means the unit charge by which the measure of exposure or the amount of insurance specified in a policy of insurance or covered thereunder is multiplied to determine the premium.

(b) "Premium" means the consideration paid or to be paid to an insurer for the issuance and delivery of any binder or policy of insurance.

(c) "Rate-making" means the examination and analysis of every factor and influence related to and bearing upon the hazard and risk made the subject of insurance; the collection and collation of such factors and influences into rating systems; and the application of such rating-systems to individual risks.

(d) "Rating-system" means every schedule, class, classification, rule, guide, standard, manual, table, rating plan, or compilation by whatever name described, containing the rates used by any rating organization or by any insurer, or used by any insurer or by any rating organization in determining or ascertaining a rate.

(e) "Policy of insurance," without otherwise limiting its meaning, shall include guaranty and surety bonds.

(f) "Rating organization" means every person or persons, corporation, partnership, company, society, or association engaged in the business of rate-making for two or more insurers.

(g) "Insurer" means any person or persons, corporation, association, partnership or company authorized by the laws of this State to transact the business of insurance in this State.

(h) "Commissioner" means the Commissioner of [Banking and] Insurance of New Jersey.

(i) "Risk," as the context may require, means, (1) as to fire insurance or any other kind of insurance which, by law, may be embraced in a policy of fire insurance as part thereof or as supplemental thereto, any property, real or personal, described in a policy, exposed to any hazard or peril named in such policy; and (2) as to all other kinds of insurance not specifically included in subsection (i) (1) of this section, the hazard or peril named in a policy of

insurance.

(j) "Filer" means a rating organization or any insurer making its own rates.

**(k) "Commission" means the commission paid by the insurer to the producer or, for those insurers whose sales compensation, as reported on the insurer's expense exhibits, is not classified as a commission, such compensation shall be treated as a commission.*

4. Section 14 of P. L. 1944, c. 27 (C. 17:29A–14) is amended to read as follows:

14. *a. With regard to all property and casualty lines, a filer* [A rating organization, or any insurer making its own rates,] may, from time to time, alter, supplement, or amend its *rates,* rating-systems, or any part thereof, by filing with the commissioner copies of such alterations, supplements, or amendments together with a statement of the reason or reasons for such alteration, supplement, or amendment, *in a manner and with such information as may be required by the commissioner.* If such alteration, supplement or amendment shall have the effect of increasing or decreasing rates, the commissioner shall determine whether the rates as altered thereby are reasonable, adequate, and not unfairly discriminatory. If the commissioner shall determine that the rates as so altered are not unreasonably high, or inadequate, or unfairly discriminatory, he shall make an order approving them. If he shall find that the rates as altered are unreasonable, inadequate, or unfairly discriminatory, he shall issue an order disapproving such alteration, supplement or amendment. *With regard to private passenger automobile insurance, in addition to or concurrently with the pro-*

cedure prescribed for all other property and casualty lines, a filer may, from time to time, alter, supplement or amend its rates, rating systems or any part thereof by making an informational filing with the commissioner of alterations, supplements or amendments together with a statement of the reason or reasons therefor, including but not limited to the claim and expense experience of the individual filer,* in accordance with the provisions of subsecton c. of this section.*

b. If an insurer or rating organization files a proposed alteration, supplement or amendment to its rating system, or any part thereof, which would result in a change in rates, the commissioner may, or upon the request of the filer or the Public Advocate, shall certify the matter for a hearing. The hearing shall, at the commissioner's discretion, be conducted by himself or by the Office of Administrative Law, created by P. L. 1978, c. 67 (C. 52:14F–1 et seq.), as a contested case. The following requirements shall apply to the hearing:

(1) The hearing shall commence within 30 days of the date of the request or decision that a hearing is to be held. The hearing shall be held on consecutive working days. If the hearing is conducted by an administrative law judge, the administrative law judge shall submit his findings and recommendations to the commissioner within 30 days of the close of the hearing. A decision shall be rendered by the commissioner not later than 60 days from the close of the hearing. A filing shall be deemed to be approved unless rejected or modified by the commissioner within the time period provided herein.

(2) The commissioner, or the Director of the Office of Administrative Law, as appropriate, shall notify all interested parties, including the Public Advocate on behalf of insurance consumers, of the date set for commencement of the hearing on the date of the filing of the request for a hearing, or within 10 days of the decision that a hearing is to be held.

(3) The insurer or rating organization making a filing on which a hearing is held shall bear the costs of the hearing.

(4) The commissioner may promulgate rules and regulations (a) to establish standards for the submission of proposed filings, amendments, additions, deletions and alterations to the rating systems of filers, which may include forms to be submitted by each filer; and (b) making such other provisions as he deems necessary for effective implementation of this act, except that all requests for information shall be limited to the kinds of detail required by the commissioner under section 5 of P. L. 1944, c. 27 (C. 17:29A-5).

c. (1) With regard to private passenger automobile insurance, the commissioner shall annually promulgate, on or before February 1, separately for each coverage, a maximum annualized percentage change in rate level which a filer may implement, in whole or in part, in a single or multiple filings, in connection with the informational filing procedure of subsection a. of this section. The maximum annualized percentage change in rate level shall be based on rates promulgated by the rating bureau which files rates for the greatest number of insurers "in the voluntary private passenger automobile insurance market" in the State, exclusive of the residual market equalization charges as defined in subsection o.

of section 15 of the "New Jersey Automobile Full Insurance Availability Act" (P. L. , c. ; C.).

(2) The maximum annualized percentage change which a filer may implement pursuant to subsection a. of this section shall be equal to the arithmetic average of the full annualized percentage changes implemented during the preceding three calendar years in which a rate increase was implemented by the rating bureau which files rates for the greatest number of insurers "in the voluntary private passenger automobile insurance market" in the State. For purposes of this paragraph, the full annualized rate level percentage change implemented in any one calendar year shall be equal to the sum of all full annualized rate level percentage changes implemented during the same calendar year.

(3) Rates filed under this subsection should take effect on the date of the informational filing with the commissioner.

5. Section 2 of P. L. 1968, c. 385 (C. 17:28–1.1) is amended to read as follows:

2. *a.* No automobile liability policy or renewal of such policy, of insurance insuring against loss resulting from liability imposed by law for bodily injury or death, sustained by any person arising out of the ownership, maintenance or use of a motor vehicle shall be issued in this State with respect to any motor vehicle registered or principally garaged in this State unless it includes coverage, in limits for bodily injury or death as follows:

[a.] *(1)* an amount or limit of $15,000.00, exclusive of interest and costs, on account of injury to, or death of, one person, in any one accident, and

[b.] *(2)* an amount or limit, subject to such limit for any one person so injured or killed, of $30,000.00, exclusive of interest and costs, on account of injury to or death of more than one person, in any one accident,

under provisions approved by the Commissioner of Insurance, for payment of all or part of the sums which the insured or his legal representative shall be legally entitled to recover as damages from the operator or owner of an uninsured automobile, or hit and run automobile as defined in section 18 of chapter 174 of the laws of 1952 (C. 39:6-78), because of bodily injury, sickness or disease, including death resulting therefrom, sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured or hit and run automobile anywhere within the United States or Canada. All such automobile liability policies shall also include coverage for the payment of all or part of the sums which persons insured thereunder shall be legally entitled to recover as damages from owners or operators of uninsured automobiles, other than hit and run automobiles, because of injury to or destruction to the personal property of such insured with a limit in the aggregate for all insureds involved in any one accident of $5,000.00, and subject, for each insured, to an exclusion of the first $100.00 of such damages.

b. Uninsured and underinsured motorist coverage in excess of that provided for in subsection a. of this section shall be provided as an option by an insurer to the named insured up to at least the following limits: $250,0000.00 each person and $500,000.00 each accident for bodily injury: $100,000.00 each accident for property

damage or $500,000.00 single limit, subject to an exclusion of the first $100.00 of such damage to property for each accident, except that the limits for uninsured and underinsured motorist coverage shall not exceed the insured's automobile liability policy limits for bodily injury and property damage, respectively.

Rates for uninsured and underinsured motorist coverage for the same limits shall, for each filer, be uniform on a Statewide basis without regard to classification or territory.

For the purpose of this section, "underinsured motorist coverage" means insurance for damages because of bodily injury and property damage resulting from an accident arising out of the ownership, maintenance or use of an underinsured automobile. An automobile is underinsured when the sum of the limits of liability under all bodily injury and property damage liability bonds and insurance policies available to a person against whom recovery is sought for bodily injury or property damage is, at the time of the accident, less than the applicable limits of liability afforded under the automobile insurance policy held by the person seeking such recovery.

6. a. (New section) A merit rating accident surcharge system for private passenger automobiles may be used both in the voluntary market and by the New Jersey Automobile Full Insurance Underwriting Association created pursuant to P. L. , c. ; C. . No surcharges for damage to any property shall be imposed on or after the operative date of this act, unless there is an accident within a three year period immediately preceding the effective date of coverage which results in payments by the

insurer of at least a $300.00 property damage liability claim or any payment by the insurer of a bodily injury claim arising out of a collision of a private passenger automobile with a pedestrian. All moneys collected under this subsection shall be retained by the insurer assessing the surcharge. Accident surcharges shall be imposed for a three year period and shall, for each filer, be uniform on a Statewide basis without regard to classification or territory.

b. There is created a New Jersey Merit Rating Plan which shall apply to all drivers and shall include, but not be limited to the following provisions:

(1) (a) Plan surcharges shall be levied by the Division of Motor Vehicles on any driver who has accumulated, within the immediately preceding three year period, beginning on or after the effective date of this act, six or more motor vehicle points as provided in Title 39 of the Revised Statutes, exclusive of any points for convictions pursuant to R. S. 39:4-50; except that the allowance for a reduction of points in Title 39 of the Revised Statutes shall not apply for the purpose of determining surcharges under this paragraph. Surcharges shall be levied for each year in which the driver possesses six or more points. Surcharges assessed pursuant to this paragraph shall be not less than $100.00 for six points, and not less than $25.00 for each additional point. The commissioner may increase the amount of surcharges as he deems necessary.

(b) For a three year period following the effective date of this act, any driver who has accumulated on or after that date three or "*more*" motor vehicle points, other than for a conviction pursuant

to R. S. 39:4–50, shall be annually subject to a surcharge in the amount of $55.00 for the first three points and $15.00 for each additional point up to six. For six or more points, the surcharges provided in paragraph (1) (a) shall apply. The allowance for a reduction of points as provided in Title 39 of the Revised Statutes shall not apply for the purpose of determining surcharges under this paragraph. The provisions of this paragraph shall expire three years following the effective date of this act.

(2) Plan surcharges shall be levied for convictions under R. S. 39:4–50 for a violation occurring on or after the effective date of this act. Surcharges levied under this paragraph shall be for a three year period, and shall be not less than $1,000.00 for each of the first two convictions, and not less than $1,500.00 for *[each additional]* *the third* conviction occurring within a three year period. The commissioner may increase the amount of surcharges as he deems necessary.

[(3) The dollar amount of all surcharges levied under the New Jersey Merit Rating Plan shall for each filer, be uniform on a Statewide basis, without regard to classification and territory.]

If, upon receipt of written notification by certified mail, return receipt requested, from the Division of Motor Vehicles, mailed to the last address of record with the division, a driver fails to pay a surcharge levied under this subsection, the license of the driver shall be suspended forthwith until the surcharge is paid to the Division of Motor Vehicles; except that upon satisfactory showing of indigency, the Division of Motor Vehicles may authorize payment of the surcharge on an installment basis over a period not

to exceed six months.

All moneys collectible under this subsection shall be billed and collected by the Division of Motor Vehicles. Of the moneys collected, 80% shall be remitted to the New Jersey Automobile Full Insurance Underwriting Association, and 20% shall be retained, for administrative expenses, by the Division of Motor Vehicles and turned over to the State Treasury for deposit in a special account to be used by the Division of Motor Vehicles, as may be necessary, to modernize its operations and improve its effectiveness and efficiency in order to discharge its statutory obligations. Any moneys in the special account at the end of a fiscal year shall be transferred to the General State Fund for use for general State purposes. Moneys shall be appropriated annually to the special account.

c. Any motor vehicle conviction points accumulated within a three year period prior to the operative date of this act by a driver insured under the automobile insurance plan established pursuant to P. L. 1970, c. 215 (C. 17:29D-1), shall be carried over into the New Jersey Automobile Full Insurance Underwriting Association, if such driver is insured by the association, and shall be used to determine any surcharges for motor vehicle convictions to which the driver may be subject pursuant to subsection b. of this section. Surcharges shall be levied in accordance with subsection b., except that the New Jersey Automobile Full Insurance Underwriting Association shall bill and collect the surcharges. Of the moneys collected, the association shall retain 80% and 20% shall be remitted to the Division of Motor Vehicles and turned over to the

State Treasury for deposit in a special account for use as provided in subsection b. Moneys shall be appropriated annually to the special account.

The provisions of this subsection shall expire three years from the operative date of this act.

d. The dollar amount of all motor vehicle conviction surcharges shall be at least equivalent to the differential between the rates charged to insureds as promulgated by the rating bureau which files rates for the greatest number of insurers **in the voluntary private passenger automobile insurance market** in this State and the Supplement I rates in use as of December 31, 1982 by the automobile insurance plan established pursuant to P. L. 1970, c. 215 (C. 17:29D-1), and the amount collectible under the motor vehicle conviction surcharge system in use by the automobile insurance plan established pursuant to P. L. 1970, c. 215 (C. 17:29D-1 et seq.) prior to the implementation of this act.

e. The Commissioner of Insurance and the Director of the Division of Motor Vehicles, as may be appropriate, shall adopt any rules and regulations necessary or appropriate to effectuate the purposes of this section.

7. (New section) Any filing made for the purpose of automobile insurance rate making shall indicate the actual rate needs of the filer, provided, however, that (a) each filer's rate classification definitions, as used by that filer, shall be uniform Statewide; (b) the automobile insurance rate charged an insured shall not exceed two and one-half times the filer's territorial base rate for each coverage,

exclusive of driving record surcharges and discounts; and (c) the automobile insurance rate for the base class in any territory for any filer shall not exceed 1.35 times the filer's Statewide average base rate for each coverage, exclusive of driving record surcharges and discounts. The automobile insurance rate of an automobile whose principal operator is 65 years of age or older shall not exceed one and one-quarter times the Statewide average rate for principal operators 65 years of age or older for each coverage, exclusive of driving record surcharges and discounts; provided, however, that no filer shall increase rates for principal operators 65 years of age or older as a result of the implementation of this section unless more than 50% of its insureds are principal operators 65 years of age or older.

As used in this section, base rate means the automobile insurance rate charged for an automobile that is not used in business and not used in going to and from work except for the going to and from work distance included in the pleasure use classification of the filer, and where there is no youthful operator, as defined in the filer's classification system. The base rate class shall not include automobiles to which discounts apply under the filer's classification system, including, but not limited to, farmer's and senior citizen's automobiles.

The provisions of this section shall be implemented after the implementation of the provisions of subsection a. of section 8 of this act.

8. (New section) a. Every filer making automobile rates in this State shall apply on a flat and uniform fee basis per insured auto-

mobile Statewide those miscellaneous taxes, licenses, and fees, as defined in the most recent rate filing of an automobile filer, and at least 90% of its general expenses and acquisition, field supervision, and collection expenses, excluding commissions, as such expenses are defined in the filer's most recent rate filing with the commissioner.

b. The commissioner and the State Treasurer shall issue a regulation no later than 90 days after the effective date of this act to require automobile filers to calculate and collect taxes for their insureds paid pursuant to P. L. 1945, c. 132 (C. 54:18A–1 et seq.) and any assessments to be made pursuant to sections 4, 6 and 7 of P. L. 1952, c. 174 (C. 39:6–64, 39:6–66 and 39:6–67), exclusive of assessments made to reimburse a filer for medical benefits payable under section 4 of P. L. 1972, c. 70 (C. 39:6A–4) in excess of $75,000.00, on a flat and uniform fee basis per insured automobile Statewide, which shall take effect on January 1, 1984.

9. (New section) Within 60 days following the effective date of this act, every filer shall reduce by at least 5% the rates of all principal operators 65 years of age or older from the rates in effect as of the effective date of this act. On or before the effective date of this reduction, every filer shall make an informational filing with the commissioner reflecting the change.

10. (New section) The commissioner shall promulgate rules and regulations requiring insurers to offer a range of deductibles up to at least $1,000.00 for private passenger automobile collision and comprehensive coverages.

11. (New section) No producer commission shall be paid on the

additional premium generated by an inexperienced operator classification.

12. (New section) The Banking and Insurance Committee of the General Assembly, and the Labor, Industry and Professions Committee of the Senate, or their respective successors, are constituted as a joint committee for the purposes of monitoring and evaluating the effectiveness of the implementation of sections 4 to 11 of this act, and said joint committee shall, as it may deem appropriate, issue recommendations for administrative or legislative changes affecting the implementation of this act.

13. (New section) Sections 13 to 34 of this act shall be known and may be cited as the "New Jersey Automobile Full Insurance Availability Act."

14. (New section) The purpose of this act is to assure to the New Jersey insurance consumer full access to automobile insurance through normal market outlets at standard market rates, to encourage the use of available market facilities, to provide automobile insurance for qualified applicants who cannot otherwise obtain such insurance through a full automobile insurance underwriting association, and to require that companies be made whole for losses in excess of regulated rates on all risks not voluntarily written by providing procedures for the spreading and recoupment of losses based on actual experience.

15. (New section) As used in sections 13 to 34 of this act:

a. "Association" means the New Jersey Automobile Full Insurance Underwriting Association.

b. "Automobile" means a private passenger automobile of a

private passenger or station wagon type that is owned or hired and is neither used as a public or livery conveyance for passengers nor rented to others with a driver; a motor vehicle with a pickup body, a delivery sedan or a panel truck or a camper type vehicle used for recreational purposes owned by an individual or by husband and wife who are residents of the same household, not customarily used in the occupation, profession or business of the insured other than farming or ranching; and, solely for the purposes of this act, a motorcycle, as defined in R. S. 39:1-1—An automobile owned by a farm family copartnership or corporation which is principally garaged on a farm or ranch and otherwise meets the definitions contained in this section, shall be considered a private passenger automobile owned by two or more relatives resident in the same household.

c. "Automobile insurance" means direct insurance against injury or damage, including the legal liability therefor, arising out of the ownership, operation, maintenance or use of automobiles, including but not limited to, personal injury protection insurance, bodily injury liability insurance, property damage liability insurance, physical damage insurance and uninsured and underinsured motorist insurance.

d. "Board" or "board of directors" means the board of directors of the association.

e. "Company" or "member" means an insurer member of the association.

f. "Commissioner" means the Commissioner of Insurance.

g. "Director" means a member of the board of directors of the

New Jersey Automobile Full Insurance Underwriting Association.

h. "Net direct car years of liability exposure" means direct bodily injury liability car years of exposure, after deducting returns for cancellations, but without adding reinsurance assumed or deducting reinsurance ceded, as determined by the board and approved by the commissioner.

i. "Net direct car years of physical damage exposure" means direct physical damage car years of exposure, after deducting returns for cancellations, but without adding reinsurance assumed or deducting reinsurance ceded, as determined by the board and approved by the commissioner.

j. "Person" means every natural person.

k. "Plan of operation" means the plan of operation of the association created pursuant to section 18 of this act.

l. "Producer" means an agent or broker licensed to transact the business of automobile insurance in this State.

m. "Qualified Applicant" means a person **domiciled in New Jersey,** who is an owner of an automobile registered and principally garaged in this State **[*or is a New Jersey domiciliary who has a driver's license which is valid in this State*]**, except that nonresidents who are members of the United States military forces shall be eligible with respect to automobiles registered in other states if such military nonresidents are stationed in this State and their vehicles are garaged in this State at the time the application is made and if they are otherwise eligible for insurance coverage issued by the association. No person shall, however, be deemed a qualified applicant, if the principal operator of the automobile to

be insured does not hold a driver's license which is valid in this State; or if a regular operator of the automobile other than the principal operator does not hold such a license; or if timely payment of premium is not tendered; or if the principal operator of the automobile does not furnish the information necessary to effect insurance; or if such person rents or leases automobiles to others or automobiles which are used for commercial purposes.

n. "Underinsured motorist coverage" means insurance for damages because of bodily injury and property damage caused by accident and arising out of the ownership, maintenance or use of an underinsured automobile. An automobile is underinsured when the sum of the limits of liability under all bodily injury and property damage liability bonds and insurance policies available to a person against whom recovery is sought for bodily injury or property damage is, at the time of the accident, less than the applicable limits of liability afforded under the automobile insurance policy held by the person seeking such recovery.

o. "Residual market equalization charge" means the amount which when added to all other sources of association income, will cause the association to operate on a no profit, no loss basis.

16. (New section) There is created in the State of New Jersey an unincorporated nonprofit association to be known as the New Jersey Automobile Full Insurance Underwriting Association consisting of all insurers licensed to transact automobile insurance in this State, with its headquarters located in a place within the State of New Jersey to be determined by the board of directors, with the approval of the commissioner. Every such insurer shall be a

member of the association and shall be bound by the association's plan of operation as conditions of authority to transact automobile insurance in this State. Any insurer which has ceased to transact automobile insurance in this State shall nevertheless remain liable for income, as provided in the plan of operation, with respect to business transacted prior to the effective date of its cessation of business in the State, and the commissioner may require such an insurer to deposit with the association an amount sufficient to meet such insurer's obligations.

17. (New section) a. Within 45 days after the effective date of this act, the Governor shall appoint a board of directors, and within 30 days after the appointment of the board, the commissioner shall call the first, or organizational meeting of the association which shall seat the board of directors. The board shall consist of 14 persons to be appointed by the Governor, of which eight shall represent member companies, three shall represent producers, and three shall be public members. Members of the board shall be compensated from the moneys of the association for their services, pursuant to standards and procedures set forth in the plan of operation. In appointing the representatives of the member companies, the Governor shall select two persons from a list of not fewer than three persons nominated by the American Insurance Association, or its successor organization, from the officers or employees of insurers which are licensed to transact automobile insurance in this State and which are members or subscribers of that organization; two persons from a list of not fewer than three persons nominated by the Alliance of American Insurers, or its successor organization,

from the officers or employees of insurers which are licensed to transact automobile insurance in this State and which are members or subscribers of that organization; two persons from a list of not less than three persons nominated by the National Association of Independent Insurers, or its successor organization, from the officers or employees of insurers which are licensed to transact automobile insurance in this State and which are members or subscribers of that organization; and two persons from the officers or employees of any insurers which are licensed in this State and are not members or subscribers of any of the above mentioned organizations. All nominations made by the associations shall include at least one representative of an insurer which does not intend to be a servicing carrier. In appointing the producer representatives, the Governor shall select one person from a list of not fewer than three nominated by the Professional Insurance Agents Association or its successor organization; one person from a list of not fewer than three nominated by the Independent Insurance Agents Association or its successor organization; and one person from a list of not fewer than three nominated by the Insurance Brokers Association or its successor organization. The Governor shall name two surrogates for each director on the board from a list submitted to him by each appointee. The Governor shall, with the advice and consent of the Senate, also appoint three public members to the board. The commissioner or his designated representative shall be entitled to attend and participate in all meetings of the board or any of its committees.

Each *[company]* *trade association* and producer association

shall have 15 days days from the effective date of this act to submit its prescribed list of board of director candidates to the Governor. The Governor shall have 30 days from receipt of each list to select permanent board members from it. If any of the associations named in this section fails to submit the lists from which the Governor is to select members of the board of directors within time, the Governor shall appoint temporary board members to represent each association that has failed to submit its list. In selecting temporary board members, the Governor shall be guided by the selection criteria set forth herein. Upon subsequent receipt of the list from the association, the Governor shall select permanent board members to replace the temporary board members within 30 days. Such replacement shall become effective immediately.

The initial appointment of four insurer directors, one producer-group director, and one public member shall be for a term of one year. The initial appointments of all other directors shall be for terms of two years. After the initial appointments all directors shall be appointed for terms of two years and shall serve until their successors are appointed and qualified. The Governor shall fill all appointed vacancies on the board consistent with the above-mentioned procedures and classifications. Appointments to fill vacancies shall be for the unexpired term of the director to be replaced. Directors may be reimbursed from the moneys of the association for reasonable expenses incurred by them as members.

b. After the board has been appointed it shall elect from its membership a chairman and shall then meet thereafter at least annually, and as often as the chairman or the plan of operation

shall require, or at the request of any five members of the board or the commissioner. Each member of the board shall be entitled to one vote. The commissioner, or his designated representative, shall have no right to vote. Eight voting members of the board shall constitute a quorum. A majority of the voting members shall determine any action of the board. No member may serve as chairman for more than two consecutive years.

c. The board shall have and exercise all powers of the association not reserved to the members by the plan of operation or as otherwise provided in this act.

18. (New section) a. Within 90 days after the organizational meeting, unless after the sixtieth day, but not later than the seventieth day, following the organizational meeting, the *[board]* *commissioner* for good cause grants an additional period not to exceed 30 days, the board shall file with the commissioner for his approval a proposed plan of operation, consistent with the provisions of this act, which shall provide for the prompt and efficient provision of automobile insurance to qualified applicants. The plan of operation shall provide for, among other matters, methods and means for the collection, investment and disbursement of funds; methods and standards for the establishment of adequate, actuarially sound reserves for unpaid losses, including provision for incurred but not reported losses; reasonable and adequate commissions to producers; protection of the interests of producers of record without a contractual relationship with a voluntary market member company; procedures and methods for issuing policies on behalf of the association; the method for determining and means

of assessing the liability of an insurer which ceases to transact automobile insurance in this State with respect to business transacted prior to the effective date of its termination of membership; minimum requirements for the selection and performance of servicing carriers; minimum requirements for the performance of producers; reasonable and adequate compensation of such servicing carriers; procedures for matching producers with servicing carriers; the methods and procedures for notifying directors of the time and place of board meetings; and the phasing out of the plan for the providing and apportionment of automobile insurance pursuant to section 1 of P. L. 1970, c. 215 (C. 17:29D-1), in a manner which will minimize the shifting of insureds among carriers, except that nothing herein shall be interpreted to affect the provisions of P. L. 1968, c. 158 (C. 17:29C-6 et seq.).

b. The plan of operation adopted by the board shall be submitted to the commissioner for his review and approval. If the commissioner approves the proposed plan, he shall certify such approval to the directors and said plan shall take effect on the date certified by the commissioner. If the commissioner disapproves all or any part of the proposed plan of operation, he shall return same to the directors with a statement, in writing, of the reasons for his disapproval and any recommendations he may wish to make. The directors may accept the commissioner's recommendations or may propose a new plan, which recommendations or plan shall be submitted to the commissioner within 30 days after the return of a disapproved plan to the directors. If the directors do not submit a proposed plan of operation or if the directors do not submit a

new plan which is acceptable to the commissioner, or accept the recommendations of the commissioner within 30 days after the disapproval of a proposed plan, the commissioner shall promulgate a plan of operation and certify same to the directors. Any such plan promulgated by the commissioner shall take effect on the date certified by the commissioner.

c. The directors of the association may amend the plan of operation at any time, subject to approval by the commissioner.

d. The commissioner shall review the plan of operation at least once a year, and may propose amendments to the board. If the board does not adopt amendments acceptable to the commissioner within 30 days, the commissioner may certify amendments and their effective date to the board.

e. Any order of the commissioner with respect to the plan of operation, or any amendment thereto, shall be subject to review by the Appellate Division of the Superior Court.

19. (New section) Pursuant to the plan of operation, the association shall have the power and duty to:

a. Enter into contracts as are necessary or proper to carry out the provisions and purposes of this act;

b. Sue or be sued in the name of the association, including taking any legal actions necessary or proper for recovery of any assessments for, on behalf of, or against members. A judgment against the association shall not create any direct liability against the servicing carrier, board of directors or the individual members, or the individual participating members of the association;

c. Indemnify its directors and employees for any and all claims,

suits, costs of investigations, costs of defense, settlements or judgments against them on account of an act or omission in the scope of a director's duties or employee's employment. The association shall refuse to indemnify if it determines that the act or failure to act was because of actual fraud, willful misconduct or actual malice;

d. Take such action as is necessary to prevent and avoid the payment of improper claims against the association or the coverage provided by or through the association;

e. Arrange for the issuance of automobile insurance to any qualified applicant through servicing carriers. Each servicing carrier shall issue policies in the name of the servicing carrier, on behalf of the association, to the extent the plan of operation provides. Servicing carriers, as agents of the association, shall have no individual liability for claims or policies written by the association;

f. Appoint from among its members appropriate legal, actuarial, claims, investment and other committees as necessary to provide technical assistance in the operation of the association, policy and other contract design, and any other function within the authority of the association;

g. Establish standards for, and review operating practices of, servicing carriers and producers to determine whether such practices are adequate to properly service association business, and to take appropriate action to eliminate inadequate operating practices and develop adequate operating practices, and to appoint an audit committee to review operating practices. The audit committee shall be composed of servicing carriers, producers, and mem-

ber companies who are not servicing carriers;

h. Develop criteria and establish a monitoring system to ensure that: (1) servicing carriers do not obtain an unfair advantage, because of their servicing carrier relationship with producers over other member companies which are not servicing carriers; and (2) member companies do not obtain an unfair advantage over producers of record without a contractual relationship with a voluntary market company, as a result of an offer of voluntary market coverage to an insured of the association.

i. Order the reporting of such statistics by the members of the association as it deems necessary;

j. Reimburse servicing carriers from association funds;

k. Adopt bylaws for the regulation of its internal affairs;

l. Employ a general manager, who shall serve at its pleasure and be responsible for the conduct of the administrative affairs of the association. The board may employ other necessary personnel and may delegate to the general manager and other personnel such authority as it deems necessary to assure proper administration and operation of the association consistent with the plan of operation. The board shall arrange and contract if necessary for suitable quarters within the State of New Jersey for operations of the association for such equipment, goods and services and insure such expenses as it deems necessary to assure efficient administration of the association consistent with the plan of operation. If required by the plan of operation, the board may establish service centers in underserviced areas, which service centers shall provide for the dissemination of full information on the coverages available

under this act and for referrals to appropriate outlets for the acquisition of such coverage;

m. Hear and determine complaints of any member or producer concerning the operation of the association in accordance with procedures prescribed in section 28 of this act;

n. Annually report to the commissioner on the operation of the association;

o. Record and investigate complaints involving the conduct of producers and to take appropriate corrective action or to recommend to the commissioner appropriate disciplinary action, including suspension or revocation of authority to write association business;

p. Review servicing practices of servicing carriers to determine whether such practices are adequate to properly service the risks written by the association; and upon finding that the practices of any servicing carrier are inadequate, establish a program for that member which will assist the servicing carrier in the performance of its duties and charge that servicing carrier a reasonable fee for establishing and operating such a program;

q. Audit the operations of members for the purpose of determining compliance with this act;

r. Develop methods and standards for the establishment of adequate, actuarially sound reserves for unpaid losses, including provision for incurred but not reported losses; and

s. Take such other action as is necessary to effectuate the purposes of this act.

20. (New section) a. The association shall derive income from

the following sources for the payment of expenses, losses, and the provision of adequate, actuarially sound reserves for unpaid losses, including incurred but not reported losses, in connection with association business: (1) net premiums earned; (2) income generated from any association accident surcharge system permitted or required by law; (3) that percentage of surcharges collected by the Division of Motor Vehicles and deposited with the association pursuant to subsection b. of section 6 of the "New Jersey Automobile Insurance Reform Act of 1982" (P. L. , c. C. .....), and that collected and retained by the association pursuant to subsection c. of said section 6; (4) income collected by members of the association and by the association pursuant to subsection b. of this section; and (5) income from investment of moneys collected pursuant to subsections (1), (2), and (3) of this subsection. Premiums received as a residual market equalization charge on behalf of the association, net of commissions paid, and all premium taxes, shall on a monthly basis be certified to by the carrier and shall be transferred to the association in accordance with the plan of operation. All premiums received by servicing carriers on behalf of the association, net of commissions paid, all premium taxes, and servicing carrier compensation, shall on a monthly basis be certified to by the carrier and shall be transferred to the association in accordance with the plan of operation.

All claims paid on association business shall be disbursed by the servicing carriers or the association through drafts drawn on association funds in accordance with the plan of operation. Servicing carriers, as agents of the association, shall have no individual

liability on claims or policies written by the association.

b. At least annually, the board shall file its experience with the commissioner, which experience shall include the projected income, expenses, losses and reserve requirements of the association for the ensuing year, any adjustment in previously established reserves for unpaid losses necessary to make such reserves adequate and actuarially sound, and the initial filing shall include the experience of the automobile insurance plan established pursuant to P. L. 1970, c. 215 (C. 17:29D-1). The board shall include in its filing with the commissioner, for his approval, a computation of the residual market equalization charge per insured vehicle to be collected by each member from its voluntary insureds, exclusive of principal operators 65 years of age or older, and by each servicing carrier from association insureds, exclusive of principal operators 65 years of age or older, to offset the anticipated losses of the association.

At the end of the first 12 months of the operation of the association and at least annually thereafter, the board shall also include in its filing with the commissioner a review of the previous year's experience, setting forth the income losses, and reserve requirements, including any adjustment in previously established reserves for unpaid losses necessary to make such reserves adequate and actuarially sound, and expenses of the association during the previous year. If a profit is found by the commissioner to have been realized, such amount shall reduce the residual market equalization charge levied on policyholders pursuant to subsection d. of this section. If a loss is found by the commissioner to have occurred,

such amount shall increase the charge levied on policyholders pursuant to subsection d. of this section. The filing shall be accompanied by such statistics and other information as the commissioner may deem necessary. The commissioner shall, within 60 days of such filing, approve or disapprove the filing. Failure to act within 60 days shall be deemed approval of the filing except that the running of the 60-day period shall be tolled by a request for additional information by the commissioner or until the association notifies the commissioner that it will not provide such additional information, together with the reason for not supplying the information. Failure to comply with a reasonable request for information may be a ground for disapproving all or part of the filing. If the commissioner disapproves all or part of the filing, he shall state the reasons for such disapproval, and indicate such portion of the filing he approves. Such disapproval shall be subject to review by the Appellate Division of the Superior Court.

c. The residual market equalization charge last approved by the commissioner shall continue to apply while the application for the revised charge is being processed by the commissioner pursuant to this section.

d. The residual market equalization charge per insured vehicle shall be collected following the effective date of such approval by the insurer from its policyholders, exclusive of principal operators 65 years of age or older, on a uniform net direct car year of liability exposure basis and a net direct car year of physical damage exposure basis. Any insurer or rating organization making a residual market equalization charge pursuant to this subsection

shall, 15 days prior to the date of the implementation of the proposed rate adjustment, make an informational filing with the commissioner documenting compliance with the established method of distributing such residual market equalization charge.

e. Any insurer licensed to transact automobile insurance after the effective date of this act, shall become a member of the association upon receiving such license and the determination of any such insurer's participation in the association shall be made as of the date of such membership in the same manner as for all other members of the association.

21. (New section) a. Any qualified applicant shall be entitled to apply to the association for insurance coverage available pursuant to section 27 of this act. Subject to procedures established in the plan of operation, producers shall have authority to issue binders to qualified applicants.

b. If the servicing carrier determines that the applicant is a qualified applicant, the carrier, as an agent of the association, upon receipt of the appropriate premium, or such portion thereof as is prescribed in the plan of operation, shall issue or cause to be issued a policy of automobile insurance which shall include coverages and limits requested by the applicant and available under section 27 of this act.

c. No licensed insurance producer regularly engaged in selling or placing automobile insurance in this State shall refuse to furnish to any applicant quotations of premiums for association automobile insurance or shall fail to submit the application of a qualified applicant to the association when requested to do so by a qualified

applicant.

d. No company shall terminate any agent or restrict the authority of any agent, directly or indirectly, or in any manner whatsoever, solely by reason of the volume of such agent's business written on behalf of the association or the experience produced by such business.

e. The association shall accept applications for coverage 90 days after the plan of operation has been approved.

22. (New section) Producers who are exclusive representatives of a company which is a servicing carrier shall be assigned to that carrier for the servicing of association policies. Producers who are not exclusive representatives of a servicing carrier may, at the election of the producer and with the consent of the servicing carrier, contract with the association to do business through any servicing carrier. Producers who are not exclusive representatives of a company which is a servicing carrier or who have not otherwise established a contractual relationship with a servicing carrier pursuant to this section, shall be assigned to all servicing carriers on an equitable basis by the association, pursuant to the plan of operation. The assignments shall be in proportion to the percentage of association business which each servicing carrier has contracted with the association to accept and shall be balanced among territories. The assignments shall be reviewed at least annually and upon the request of a servicing carrier or producer. Pursuant to the plan of operation, the assignments shall be reallocated if it is found that the allocations are demonstrably in equitable. Reallocations shall be made in a manner to minimize the shifting of producers.

Every producer shall be assigned two alternate servicing carriers, pursuant to the plan of operation. In the event that any servicing carrier normally assigned to any producer ceases, as may be provided in the plan of operation, to accept applications temporarily, such applications shall be redistributed by the association to each producer's alternate servicing carrier.

23. (New section) The producer shall receive commissions on association business in accordance with a schedule of commissions promulgated in the plan of operation. The schedule of commissions so promulgated shall be designed to serve and reconcile the following objectives: a. to encourage equal treatment of policyholders in the association and the voluntary market; b. to minimize disincentives to the placement of applicants in the voluntary market; c. to stimulate marketing efforts in underserviced areas; d. to provide reasonable compensation for services performed by producers; e. to provide protection to the producer of record without a voluntary market company, upon the offer of voluntary market coverage to an association insured; f. to provide for an equitable rate of commission for producers during a transition period, as the term of such period is determined by the board. No rate of commission shall be less than that provided pursuant to the automobile insurance plan established pursuant to P. L. 1970, c. 215 (C.17:29D-1), as payable as of December 31, 1981.

24. (New section) a. Pursuant to the procedures and standards established in the plan of operation, the board may permit any qualified member to act as a servicing carrier upon application by the member. Insurers under common management or ownership

may elect to submit an application to act as a servicing carrier in the name of any company in the group which is licensed and authorized to transact automobile insurance in this State. The commissioner may disapprove the action by the board, if he finds that the action is not in the best interests of the association, the insurer, or the purposes of this act, within 20 days of final approval by the board. The disapproval shall be made in writing and shall set forth the reasons for disapproval.

b. After notice and hearing, the commissioner may require one or more members of the association or member of a group as provided in subsection a. of this section to act as servicing carriers, if he determines that the action is necessary to effectuate the purposes of this act, except that no company having less than 1% of the private passenger automobile insurance market in this State based on its net written car years of exposure shall be subject to the provisions of this subsection.

c. Pursuant to procedures established by the commissioner, any member of the association which is acting as a servicing carrier may apply to the commissioner for permission to discontinue acting as a servicing carrier. After notice and a hearing, the commissioner may permit such insurer to discontinue acting as a servicing carrier, on terms to be imposed by the commissioner, if the commissioner finds that such action is in the best interests of the insurer, the association and the purposes of this act.

d. Any order of the commissioner pursuant to this section shall be subject to review by the Appellate Division of the Superior Court.

25. (New section) The rates used by the association shall be the same as those used by the rating bureau which files rates for the greatest number of insurers transacting "*private passenger*" automobile insurance "*in the voluntary market*" in this State.

26. (New section) The association shall, in the plan of operation, establish procedures to encourage the voluntary writing of qualified applicants without the utilization of the association. These procedures shall include provisions for appropriate incentives to encourage companies to voluntarily write those applicants who are qualified for insurance by the automobile insurance plan established pursuant to P. L. 1970, c. 215 (C. 17:29D-1).

Any voluntary coverage offered in accordance with established procedures of this section shall be offered through the producer of record, if such producer is the voluntary market producer of the company offering to provide this coverage; if the producer of record does not have a contractual relationship with any voluntary market company, he shall be entitled to the payment of a producer's commission for three years following the providing of voluntary coverage. Renewals of this policy shall be written through the voluntary market producer of record, unless written notice to the contrary is given by the insured not less than 30 days prior to such renewal.

27. (New section) A qualified applicant who is eligible for coverage through the association shall be offered and entitled to coverage up to at least the following limits: a. bodily injury liability: $250,000.00 each person, $500,000.00 each accident; b. property damage liability: $100,000.00; c. bodily injury and prop-

erty damage: $500,000.00 single limit each accident; d. comprehensive and collision coverage; e. uninsured motorist and underinsured motorist coverage: $250,000.00 each person and $500,000.00 each accident for bodily injury; $100,000.00 each accident for property damage or $500,000.00 single limit, subject to an exclusion of the first $100.00 of the damage to property for each accident, except that the limits for uninsured and underinsured motorist coverages on association coverage shall not exceed the insured's policy limits for bodily injury and property damage, respectively; f. personal injury protection coverage as required by law; g. additional personal injury protection coverage required to be offered by law; and h. any other automobile insurance required to be offered by law and subject to the limits stated in the law. Motorcycles shall not be written for the coverages required or required to be offered pursuant to P. L. 1972, c. 70 (C. 39:6A-1 et seq.).

28. (New section) a. A member insurer or producer aggrieved by a ruling of the association or by its alleged violation of or failure to comply with the plan of operation or the provisions of this act shall be entitled to a hearing upon a request made within 30 days after the date of the alleged violation or improper act or ruling, provided the commissioner may extend the time for requesting a hearing in extraordinary situations. The hearing shall be held within 15 days after the receipt of the request by a panel of the board consisting of not less than three member company representatives, one producer representative and one public member, at a time and place designated by the board. The ruling of a majority of the panel shall be deemed to be the formal ruling of the

board unless the full board, on its own motion, shall modify or rescind the action of the panel.

b. Within 30 days after the conclusion of any hearing held pursuant to this section, the board shall issue a written ruling setting forth the determination of the issues presented and the facts and reasons on which such determination is based. This ruling may be appealed to the commissioner by the filing of a written notice of appeal with the board and commissioner within 30 days after issuance of the ruling.

c. The commissioner shall issue a written order approving, disapproving or modifying the action or decision of the board or directing it to reconsider its ruling.

d. Any order of the commissioner pursuant to this section shall be subject to review by the Appellate Division of the Superior Court.

29. (New section) a. The commissioner may suspend or revoke, after notice and a hearing, the certificate of authority of any member insurer or the license of any agent or broker who willfully fails to comply with the provisions of this act or the regulations or plan of operation promulgated thereunder. In addition to or in lieu of suspension or revocation, any member company violating the provisions of this act or the regulations or plan of operation promulgated thereunder may be fined by the commissioner up to $5,000.00 for each such violation; and any agent or broker violating the provisions of this act or the regulations or plan of operation promulgated thereunder may be fined by the commissioner up to $1,500.00 for each violation. These penalties shall be enforced

and collected by the commissioner in the name of the State pursuant to "the penalty enforcement law" (N. J. S. 2A:58–1 et seq.).

b. If, after notice and opportunity to be heard, the board finds that a producer has violated the provisions of this act or the regulations, plan of operation or standards promulgated pursuant to this act, the board shall notify the commissioner and may request the commissioner to temporarily suspend the producer's authority to write new association business. The commissioner may issue an order suspending the producer's authority to write new association business, pending a hearing which shall be held within 20 days of the issuance of the order. If, after a hearing, the commissioner finds that the producer has violated the provisions of this act or the regulations, plan of operation or standards promulgated pursuant to this act, he shall take appropriate disciplinary action, including suspension or revocation of the producer's license or producer's authority to write business for the association or both.

30. (New section) One year after the operative date of this act and annually thereafter the commissioner shall make a comprehensive report to the Governor and the Legislature assessing the effectiveness of the act in accomplishing its stated purposes.

31. (New section) For the purposes of monitoring and evaluating the effectiveness of the implementation of this act, the commissioner shall forward a copy of the plan of operation or any amended plan of operation to the Senate and General Assembly on the first day in which both Houses shall be meeting in the course of a regular or special session after a plan or amended plan has been certified to the directors.

32. (New section) In addition to the general powers conferred upon the commissioner by law and this act, the commissioner shall have the authority to promulgate such regulations as he deems necessary for the effective implementation of this act.

33. (New section) Twelve months after the operative date of this act the board shall submit to the commissioner recommendations with respect to the provision of insurance coverage to commercial vehicles through the association or a similar entity.

34. (New section) Taxes required to be paid pursuant to P. L. 1945, c. 132 (C. 54:18A-1 et seq.) on premiums earned by the association shall be paid by the association to the Director of the Division of Taxation.

35. (New section) For purposes of evaluating the implementation and effects of the "New Jersey Automobile Insurance Reform Act of 1982" (P. L. , c. ; C.), and the "New Jersey Automobile Full Insurance Availability Act" (P. L. , c. ; C.), there is created a study commission comprised of 14 members, eight of whom shall be appointed by the Governor, three of whom shall be appointed by the Speaker of the General Assembly and three by the President of the Senate. Of the three members appointed by the Speaker, two shall be members of the General Assembly, one from each of the two principal political parties, and one shall be a public member. Of the three members appointed by the President, two shall be members of the Senate, one from each of the two principal political parties, and one shall be a public member. The Commissioner of Insurance and the Director of the Division of Motor Vehicles in the Department of

Law and Public Safety shall be ex officio members of the commission. The Governor shall appoint the chairman of the commission. Any vacancies on the commission shall be filled in the same manner as the original appointment.

The commission shall be established not later than 12 months following the operative date of this act. The commission shall organize itself as soon as practicable after the appointment of its members; the commission shall organize itself and conduct its affairs in such manner as may be deemed appropriate.

The commission shall be entitled to call to its assistance and avail itself of the services of any employee of State Government, or any political subdivision thereof, it may require and as may be available to it, and to employ such stenographic and clerical assistants and incur such traveling and other miscellaneous expenses as it may deem necessary, and as may be within the limits of funds appropriated or otherwise made available for the commission's purposes.

The commission shall have the power to compel the attendance and testimony of any witnesses and the production of any books or papers that it may deem necessary or appropriate to the conduct of its study.

The commission study shall evaluate market conditions resulting from the implementation of the aforesaid two acts with respect, but not limited to: market availability, affordability and equity of automobile insurance coverage; the operation and effectiveness of the modified two tier rating system including the effectiveness and adequacy of merit rating plans and surcharge systems; the

fairness of, and statistical basis for territory and classification systems in use; the effectiveness of the prior approval system; the effectiveness and fairness of the New Jersey Automobile Full Insurance Underwriting Association, including the adequacy and fairness of its funding system; and the creation of genuinely competitive market conditions.

The commission shall report its findings and recommendations on how to further improve the equity, availability and affordability of automobile insurance coverage to the Governor and Legislature not later than three years following the operative date of this act.

36. (New section) Severability. The provisions of this act shall be severable, and if any of its provisions shall be held to be unconstitutional, the decision of the court shall not affect the validity of the remaining provisions of this act, except that the provisions of section 25 shall not be severable from the provisions of sections 13 to 31, and if any of the provisions of section 25 shall be held to be unconstitutional, the commissioner shall establish a plan for the providing of automobile insurance pursuant to P. L. 1970, c. 215 (C. 17:29D-1).

37. Sections 1 through 36 shall take effect on January 1, 1983, but shall, except as otherwise specifically provided, remain inoperative until *[July 1, 1983]* *January 1, 1984* in order to permit the taking of such measures as may be necessary for the implementation thereof.

NO. 82-1153

Office-Supreme Court, U.S.
FILED
MAR 25 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MOTOR CLUB OF AMERICA INSURANCE COMPANY,
A Corporation of the State of New Jersey,

Appellant,

vs.

STATE OF NEW JERSEY, STATE OF NEW JERSEY DEPARTMENT OF INSURANCE and JAMES J. SHEERAN, NEW JERSEY COMMISSIONER OF INSURANCE,

Appellees.

On Appeal from the Supreme Court of New Jersey

REPLY BRIEF OF APPELLANT IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

STANLEY WEISS, *Counsel for Appellant*
ROBERT E. TURTZ

CARPENTER, BENNETT & MORRISSEY,
Attorneys for Appellant, Motor Club of America Insurance Company,
744 Broad Street,
Newark, New Jersey 07102.
(201) 622-7711

Adams Press Corp., 50 Park Place, Newark, New Jersey 07102—(201) 623-3611

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

ARGUMENT:

Point I—Appellees' position in support of their motion to dismiss or affirm is predicated upon presumed facts which Appellant will disprove if afforded the opportunity to try its case 2

Point II—The enactment of P.L. 1983, c.65 (February 10, 1983) (Ra4a through 46a) and Appellant's 1982 operating results, set forth in its 1982 Annual Report filed with Appellee, Department of Insurance do not bear upon the issue of whether Appellees have effected a taking of Appellant's property for which just compensation must be paid 7

CONCLUSION 10

APPENDIX:

Letter dated March 8, 1983 from State Commissioner to Plan Manager 1a

PAGE

Table of Authorities

Cases Cited

Automobile Insurance Plan Service Office v. James J. Sheeran, No. 2-1024-77, April 25, 1978 5

Georgia Railway & Power Co. v. Railroad Comm., 278 F. 242 (D.Ga. 1922) aff'd 262 U.S. 625 (1923) 4

San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621 (1981) 7

Statutes Cited

N.J.S.A. 17:29A-1 *et seq.* 4

N.J.S.A. 17:30C-1 3

N.J.S.A. 17:30C-1-C31 4

P.L. 1983, C.65 ..... 7, 8, 10

Rule Cited

Supreme Court Rule 28.1 1

NO. 82-1153

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MOTOR CLUB OF AMERICA INSURANCE COMPANY,
A Corporation of the State of New Jersey,

Appellant,

vs.

STATE OF NEW JERSEY, STATE OF NEW JERSEY DEPARTMENT OF INSURANCE and JAMES J. SHEERAN, NEW JERSEY COMMISSIONER OF INSURANCE,

Appellees.

On Appeal from the Supreme Court of New Jersey

REPLY BRIEF OF APPELLANT IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

Preliminary Statement

This brief is submitted on behalf of Appellant, Motor Club of America Insurance Company,* in opposition to

* Pursuant to Supreme Court Rule 28.1, we respectfully invite the Court's attention to the footnote on page i of Appellant's Jurisdictional Statement for a listing of the names of Appellant's parent company, subsidiaries (except wholly-owned subsidiaries) and affiliates.

Appellees' motion to dismiss this appeal or to affirm the final judgment of the Supreme Court of the State of New Jersey, entered on October 14, 1982 (A.21a).* This brief supplements the Jurisdictional Statement previously filed on behalf of Appellant, and upon which we principally rely in opposition to Appellees' present motions and in support of Appellant's request that the Court grant plenary consideration of the issues raised by this appeal.

ARGUMENT

POINT I

Appellees' position in support of their motion to dismiss or affirm is predicated upon presumed facts which Appellant will disprove if afforded the opportunity to try its case.

The argument Appellees have made in support of their Motion to Dismiss or Affirm is woven from a number of separate threads. The principal elements of that argument are based on a series of factual contentions that (a) "Appellant accepted, without challenge to their adequacy, rate increase after rate increase, while failing to utter one word in protest" (M.D.8); (b) Appellant failed "to make use of any of several administrative and judicial remedies available" (M.D.8); and (c) "Appellant has never attempted to cease operations voluntarily" (M.D.9).

Appellant states that Appellees' contentions are unproven and inaccurate. If given the opportunity to try its

---

* As used herein, "A" refers to the appendix to the Jurisdictional Statement; "J.S." refers to the Jurisdictional Statement; "Ra" refers to the appendix to the Motion to Dismiss or Affirm; and "M.D." refers to the Motion to Dismiss or Affirm.

case, Appellant will establish that it frequently protested to the insurance department about the injury it was sustaining; that it did seek various forms of administrative and judicial relief; and that it attempted to cease writing policies, to wind down its business, and to dispose of its assets in a manner protective of the interests of its creditors, policyholders, and shareholders.* Neither this Court nor any of the New Jersey courts is, or has been, in a position to resolve these disputes, for none of the factual contentions has been the subject of discovery, proof, or cross-examination. To the extent that the contentions have pertinence, Appellant only asks that they be decided on the record after trial rather than by pre-judgment before trial.

Additionally, Appellees' argument contains the legal contentions that the within action constitutes an impermissible collateral attack on rate making proceedings** and that it

---

* N.J.S.A. 17:30C-1 precluded Appellant from filing any proceeding to liquidate or from pursuing any other similar procedure, but Appellant did resist turning over its assets to the Commissioner whose policies had eroded their value.

** Appellant does not dispute the validity of Appellees' statement (M.D.9) that ". . . the failure of past rates to deliver a projected return may not be corrected through future rate decisions." Appellant does, however, dispute the conclusion drawn by Appellees from this statement that ". . . it logically follows that the past losses may not be recovered from the public regulator, where . . . the regulated entity failed to invoke any of the statutory or judicial remedies available . . ." (M.D.9). There is no logic involved. The concern to protect future rate payers from the burden of making up underpayments by prior users is not implicated in requiring the public generally to pay for takings of private property. Moreover, such losses, which Appellant here complains of, cannot be considered a "risk of the business" with-

(Footnote continued on following page)

is unnecessary to consider whether N.J.S.A. 17:30C-1 through C-31 destroyed Appellants' withdrawal rights."* These arguments were anticipated in the Jurisdictional Statement (J.S.5 to 10, 20n*, 24-28); and in general, we rely upon what was stated there in opposition to them. However, it is important to emphasize the critical differences between the parties concerning the availability of judicial review of rate making determinations.

Appellees rely heavily upon the availability of the right to judicially review administrative rate determinations, stating (M.D.11) that:

> At least ten separate rate increases were granted to ISO members (including appellant) by the Commissioner during the period of time encompassed by the complaint, and not one was subject to a legal challenge by ISO or by appellant as inadequate, improperly negotiated or in any way inconsistent with the standards of the Rating Law, N.J.S.A. 17:29A-1 *et seq.*

(Footnote continued from preceding page)

in the meaning of *Georgia Railway & Power Co.* v. *Railroad Comm.*, 278 F. 242, 247 (D.Ga. 1922), *aff'd* 262 U.S. 625 (1923), as argued by Appellees (M.D.9), since as we are prepared to show, the New Jersey system is not a fair one and the so-called "statutory or judicial remedies" referred to above in Appellees' argument were not available to Appellant. *See* text, this Point I.

* At M.D.9, Appellees assert that the Courts of New Jersey did not pass upon the validity of this statute. In fact, the trial judge agreed that it precluded voluntary withdrawal from business and granted Appellee, Commissioner, the sole power to decide whether and on what terms a domestic insurance carrier could be liquidated (A.6a, 7a, 17a). The Appellate Division stated that it was unnecessary for it to reach the question in view of its other determinations (A.3a). *See* J.S.11 to 14.

Appellant takes note of the quoted facts and asks "why?" Is it not surprising, to say the least, that none of the fifteen largest carriers in the State, who in the aggregate lost over $625 million between 1975 and 1979 (A.67a), raised any legal challenge? The answer to the inquiry and the explanation for the surprising result is quite simply that the rate system was coercively structured and administered as indicated in the Jurisdictional Statement (J.S.8 to 10; 25, 26). At bottom, the parties disagree over whether the statutory remedy of judicial review was in fact rendered illusory; and Appellant should be given the opportunity to prove its contention that the Commissioner's grant of some rate relief was typically conditioned upon the rating organization's withdrawal of its original application for greater relief and the filing of an amended application for the lesser relief, thus precluding appeals with respect to the disputed amount of the original requests (J.S.10). *See* the Order of the Appellate Division in *Automobile Insurance Plan Service Office* v. *James J. Sheeran*, No. 2-1024-77, April 25, 1978 (A.63a), which illustrates this coercive practice and its impact on appellate rights.

More is involved than the illusory nature of the industry's right to judicial review.* If the industry's remedies were illusory, Appellant's were doubly so once the rating organization had concluded to accept the rate the Commissioner was prepared to grant. The trial court effectively explained why this was so in fn. 8 of its Opinion (A.13a):

> The probability of relief must be real. An example of illusory relief is found in the State's argu-

---

* The issues involved here are different from those involved in rate making and could not even be raised in a rate making proceeding or in an appeal therefrom (see J.S.24-27).

ment that if MCAIC finds the industry-wide rate noncompensatory it could file on its own for a rate. It could, in the sense that nothing in the statute prevents the attempt. The State concedes, however, that a single company would be unable to present the statistical evidence necessary to command a rate decision. Yet another example of illusory relief is the possibility of an approved deviation from industry rates *viz.* special dispensation for a particular company based on its special difficulties (MCAIC has requested and the Commissioner granted a 7% upward deviation from ISO rates on three categories of insureds.) A deviation, however, places the company at a competitive disadvantage, thereby exacerbating its problems rather than solving them.

Under such circumstances, Appellees' argument that Appellant's claim is barred because of its failure to seek judicial review of prior rate making decisions is unpersuasive.

In conclusion, we submit that the thrust of Appellees' argument is to try to foreclose the proofs which will establish Appellant's claims. Appellant, on the other hand, seeks only the opportunity to make those proofs. Accordingly, we respectfully urge the Court to deny Appellees' motion and to set the case down for plenary consideration.

POINT II

The enactment of P.L. 1983, c.65 (February 10, 1983) (Ra4a through 46a) and Appellant's 1982 operating results, set forth in its 1982 Annual Report filed with Appellee, Department of Insurance, do not bear upon the issue of whether Appellees have effected a taking of Appellant's property for which just compensation must be paid.

Appellant commenced this action in October, 1980, seeking just compensation for the taking, by Appellees, of its property during the period commencing in 1975 and continuing through the filing of the Complaint. Appellees now argue in support of their Motion to Dismiss or Affirm that New Jersey's passage in 1983 of P.L. 1983, c.65 and Appellant's operating results in 1982 undercut the validity of Appellant's compensation claims (M.D.5, 6, 13, 14). The issue of whether a compensable taking of Appellant's property occurred during the period 1975 through the end of 1980 must be determined by reference to the statutory and regulatory scheme then in effect and to the method by which that scheme was administred during that period. While the subsequent reform of a harsh regulatory system—and we do not concede that the enactment of P.L. 1983, c.65 or Appellant's 1982 operating results indicate that the New Jersey insurance regulatory system has been reformed (*see, infra*)—may mark the end of a period of taking, we respectfully submit that any such reform, by itself, is not an adequate remedy for the party whose property has already been taken because it does not negate the fact of said taking or the constitutional requirement that just compensation be paid on account of it. *See* our discussion of *San Diego Gas & Electric Co.* v. *San Diego,* 450 U.S. 621 (1981) in the

Jurisdictional Statement (J.S.19, 20). For these reasons neither the enactment of P.L. 1983, c.65 nor Appellant's 1982 operating results can, as a matter of law, provide a basis to support Appellees' present Motion to Dismiss or Affirm.

The enactment of P.L. 1983, c.65 in effect constitutes a legislative recognition of the gross inequities and inadequacies of the system during the years in question in this law suit, and, as such, it underscores the validity of Appellant's claims for just compensation for the taking of its property in those years.* Further, Appellant's operating results, incorporated in its 1982 Annual Statement filed with Appellee, Department of Insurance, while not directly relevant to the issues raised in Appellant's Complaint, do emphasize the validity of Appellant's claims rather than detract from them as suggested by Appellees. Appellees have lightly glossed over the components of the

---

* Whether the new law will actually result in a beneficial reform, *in futuro*, of the regulatory system cannot be determined at this time as the law has not yet become operative. While the Appellees have asserted that the law addresses all the "perceived statutory inadequacies" of the present system (M.D.13), there are strong indications that further reform will be necessary, *e.g.*— reducing the medical portion of the personal injury protection feature of New Jersey automobile insurance policies and the possible elimination of mandatory liability coverage, before the system is fully equitable. One new bill, Assembly 3226, addressed to problems with P.L. 1983, c.65 has already passed the Assembly, and proposals for additional legislation have been made by a number of parties including Appellee, Insurance Department. Because the effect of the new statute; the future of pending legislation; and the need for possible further change are, at best, speculative, the enactment of P.L. 1983, c.65 cannot be shown to provide a framework for reform and does not form a basis to grant Appellees' present motion.

gross increase of $7,667,923 in Appellant's surplus as regards policyholders during 1982 and have strongly asserted that "these gains were produced under the statutory and regulatory mechanism complained of by appellant." (M.D.6).

While not presently in the record, Appellant is prepared to prove that more than 90% of that increased surplus was due to income realized on a June 30, 1982 sale by Appellant of its wholly-owned subsidiary, Garden State Life Insurance Company, to GEICO* and to other investment income and miscellaneous adjustments. Moreover, Appellant can show that the small underwriting gain of $601,587 (M.D.6) was due to a continuing moratorium, belatedly granted by Appellee, Commissioner, with respect to Appellant's acceptance of new assigned risk policies from the Automobile Insurance Plan, which moratorium has been in effect since January 1, 1980.** But for the moratorium, Appellant would have suffered significant underwriting losses in 1982 and would suffer further losses in 1983. In fact, by letter dated March 8, 1983, a few days prior to Appellees' present motion, the Commissioner of Insurance advised the Automobile Insurance

---

* The Verified Complaint contemplated that Appellant's surplus could be improved by the sale of its subsidiary for more than its book value (¶27(a) of Verified Complaint, A.39a). *See* also Affidavit of David Green, ¶16 (A.58a, 59a).

** As a result of that moratorium, Appellant can show that its earned premiums from its Automobile Insurance Plan business dropped from a high of $14,820,120 in 1979 to $1,661,056. As the loss ratio experienced by Appellant on this business is approximately 140%, *i.e.*—for every dollar of premium earned, one dollar and forty cents is paid out in losses and expenses (A.30a, ¶10), the substantial decline in earned premium as the result of the moratorium has been of significant benefit to Appellant.

Plan that the moratorium against Appellant's receiving assignments is to remain in effect, stating:

> . . . I find that the financial condition of the above company is such that it would create an undue financial burden upon the company if it were required to receive assignments based upon its voluntary automobile liability insurance premiums written in 1981 at the present time.
>
> I therefore direct that subject to subsequent financial developments, no assignments shall be given to MCA during 1983 based upon its voluntary automobile writings in 1981.*

We respectfully submit that neither Appellant's 1982 results set forth in its Annual Statement nor the passage of P.L. 1983, c.65, provides any basis to justify a grant of Appellees' Motion to Dismiss or Affirm.

CONCLUSION

For the reasons set forth in the Jurisdictional Statement and this brief, we respectfully submit that Appellees' Motion to Dismiss or Affirm should be denied, and we urge the Court to grant plenary consideration of the issues raised by this appeal.

Respectfully submitted,

STANLEY WEISS, *Counsel for Appellant*
ROBERT E. TURTZ

CARPENTER, BENNETT & MORRISSEY,
Attorneys for Appellant, Motor Club of America Insurance Company.

---

* A copy of the entire March 8, 1983 letter from Commissioner Murphy to the automobile Insurance Plan is annexed hereto for the information of the Court.

APPENDIX

Letter dated March 8, 1983 from State Commissioner to Plan Manager

STATE OF NEW JERSEY
Department of Insurance
Joseph F. Murphy, Commissioner
CN 325
Trenton, N. J. 08625
609-292-5360

March 8, 1983

Mr. John R. Murphy
Plan Manager
New Jersey Automobile Insurance Plan
733 Third Avenue
New York, NY 10017

RE: Motor Club of America Insurance Company
Suspension of Assignments
Rule 6 (D)
Your File No. 16012.020

Dear Mr. Murphy:

Pursuant to the provisions of Section 6 (c) (10), I find that the financial condition of the above company is such that it would create an undue financial burden upon the company if it were required to receive assignments based upon its voluntary automobile liability insurance premiums written in 1981 at the present time.

I therefore direct that subject to subsequent financial developments, no assignments shall be given to MCA dur-

Letter dated March 8, 1983 from State Commissioner to Plan Manager

ing 1983 based upon its voluntary anutomobile liability premium writings in 1981.

In making the above determination, I have considered the voluntary undertaking upon the part of MCA to pay to the Plan an amount equal to 85% of the policy constant payments made to MCA by its policyholders in connection with policies effective on January 1, 1983 and thereafter and renewals of policies previously in effect, which renewals become effective on January 1, 1983 and thereafter.

Calculation of payments required to be made to the Plan shall be on the basis of earned premiums as calculated on policies or renewals of policies in effect as shown by the books of MCA. Documentation shall be provided by MCA in form and substance reasonably satisfactory to the Plan to enable the Plan to verify computation of payments.

The above payments will be made quarterly, 45 days after each quarter. Such payments will be applied in reduction of the assessment obligations of the other member companies.

Please take further note that the Department of Insurance reserves the right to modify or discontinue the above arrangement on a prospective basis, if the financial condition of the company or the failure of the company to make the payments set forth above, shall warrant such action.

Very truly yours,

JOSEPH F. MURPHY
Commissioner

cc: Stephen A. Gilbert (MCA)
Warren P. Cooper